ORIGINAL

OPEN MEETING AGENDA ITEM

0000090846

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

Mike Gleason, Chairman
William A. Mundell
Jeff Hatch-Miller
Kristin K. Mayes
Gary Pierce

IN THE MATTER OF THE APPLICATION OF COOLIDGE POWER CORPORATION IN CONFORMANCE WITH THE REQUIREMENTS OF ARIZONA REVISED STATUTES §§ 40-360.03 AND 40-360.06, *et seq.* FOR A CERTIFICATE OF ENVIRONMENTAL COMPATABILITY AUTHORIZING CONSTRUCTION OF A NOMINAL 575 MW NATURAL GAS-FIRED, SIMLE CYCLE GENERATING FACILITY LOCATED WITHIN THE CITY OF COOLIDGE IN PINAL COUNTY, ARIZONA.	DOCKET NO. L-00000HH-08-0422-00141 CASE NO. 141 **NOTICE OF FILING**

For the convenience of the Commissioners, Staff Counsel hereby files copies of supporting references cited in Staff's October 21, 2008, Request for Review in the above-captioned matter.

RESPECTFULLY SUBMITTED this 25th day of November, 2008.

Arizona Corporation Commission
DOCKETED
NOV 25 2008
DOCKETED BY

Janice M. Alward, Chief Counsel
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007
(602) 542-3402

RECEIVED
2008 NOV 25 P 12: 18
AZ CORP COMMISSION
DOCKET CONTROL

Original and twenty-five (25) copies of the foregoing filed this 25th day of November, 2008 with:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Copies of the foregoing mailed this 25th day of November, 2008 to:

John Foreman, Chairman
Arizona Power Plant & Line Transmission Siting Committee
Office of the Attorney General
1275 West Washington Street
Phoenix, Arizona 85007

Jay Moyes
Moyes, Sellers & Sims
1850 North Central Avenue, Suite 1100
Phoenix, AZ 85004

By _____

LIST OF ATTACHMENTS

Coolidge Case No. 141 Partial Transcript 1

Open Meeting Law Statutes, A.R.S. §§ 38-431 et seq. 2

Siting Law Statutes, A.R.S. § 40-360 et seq. 3

ACC Rules 4
R14-3-113
R14-3-208
R14-3-219
R14-3-220

Decision 64446, Toltec, Case No. 112 5

Decision 63611, Santan, Case No. 105 6

AG Op. I05-004 7

AG Op. I97-012 8

AG Op. I79-4 9

AG Op. I75-8 10

AG Op. I08-008 11

Attachment 1

BEFORE THE ARIZONA POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE

IN THE MATTER OF THE APPLICATION OF COOLIDGE POWER CORPORATION IN CONFORMANCE WITH THE REQUIREMENTS OF ARIZONA REVISED STATUTES §§ 40-360.03 40-360.06, et seq., FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AUTHORIZING CONSTRUCTION OF A NOMINAL 575 MW NATURAL GAS-FIRED, SIMPLE CYCLE GENERATING FACILITY LOCATED WITHIN THE CITY OF COOLIDGE IN PINAL COUNTY, ARIZONA.	Docket No. L-00000HH-08-0422-00141 Case No. 141

At: Coolidge, Arizona

Date: September 30, 2008

Filed:

REPORTER'S TRANSCRIPT OF PROCEEDINGS

VOLUME I
(Pages 1 through 203)

ARIZONA REPORTING SERVICE, INC.
Court Reporting
Suite 502
2200 North Central Avenue
Phoenix, Arizona 85004-1481

By: COLETTE E. ROSS, CR No. 50658

Prepared for:

PUBLIC COMMENT SESSION Page 202

INDEX TO EXAMINATIONS

WITNESSES PAGE

BRAD RICHARD HOWARD, BRYAN KRAWCHYSHYN, and MARISA JOAN TOSI

Direct Examination by Mr. Moyes 36
Cross-Examination by Ms. Scott 76
Examination by Member Haenichen 86
Examination by Chairman Foreman 87
Redirect Examination by Mr. Moyes 89

RANDY SCHROEDER

Direct Examination by Mr. Moyes 93
Cross-Examination by Ms. Scott 127
Examination by Member Wong 129
Redirect Examination by Mr. Moyes 147

KENDA POLLIO

Direct Examination by Mr. Moyes 149
Examination by Member Palmer 157

ROBERT GRAY

Direct Examination by Ms. Scott 176
Cross-Examination by Mr. Moyes 187

INDEX TO EXHIBITS

NO.	DESCRIPTION	IDENTIFIED	ADMITTED
A-1	90-Day Plan with Interconnection System Impact Study	21	26
A-2	CEC Application	22	26
A-3	Placemat	22	26
A-4	Notice of Hearing and Publication/Posting Verification	22	26

INDEX TO EXHIBITS

NO.	DESCRIPTION	IDENTIFIED	ADMITTED
A-5	Witness Qualifications	23	26
A-6	PowerPoint Presentations	23	26
A-7	SRP Statement of Need	24	26
A-8	CAP Water Recharge Agreements	24	26
A-9	Letter from SHPO	24	26
A-10	Public Comment Documents	24	26
A-11	Tour Route Map and Description	24	26
A-12	Cultural Resource Report (To be supplied)	27	33
A-13	9/30/08 Letter from Coggins to Docket Control	163	163
CC-1	PowerPoint Presentation	177	177
CC-3	Draft CEC	192	194

BE IT REMEMBERED that the above-entitled and numbered matter came on regularly to be heard before the Power Plant and Transmission Line Siting Committee, at the Coolidge Youth Center, 660 South Main Street, Coolidge, Arizona, commencing at 9:39 a.m. on the 30th day of September, 2008.

BEFORE: JOHN FOREMAN, Committee Chairman

DAVID L. EBERHART, Arizona Corporation Commission
PAUL W. RASMUSSEN, Department of Environmental Quality
JACK HAENICHEN, Department of Commerce
GREGG HOUTZ, Arizona Department of Water Resources
PATRICIA NOLAND, Appointed Member
MICHAEL WHALEN, Appointed Member
MICHAEL PALMER, Appointed Member
JEFF McGUIRE, Appointed Member
BARRY WONG, Appointed Member

APPEARANCES:

For Coolidge Power Corporation:

MOYES, SELLERS & SIMS
By Messrs. Jay I. Moyes and Steven L. Wene
1850 North Central Avenue, Suite 1100
Phoenix, Arizona 85004

For the Arizona Corporation Commission Staff:
Ms. Janice Alward, Chief Counsel, and
Ms. Nancy Scott, Staff Attorney, Legal Division
1200 West Washington Street
Phoenix, Arizona 85007

COLETTE E. ROSS
Certified Reporter
Certificate No. 50658

CHMN. FOREMAN: My name is John Foreman. I am the designee of the Attorney General of the State of Arizona, Terry Goddard, and Chairman of the Arizona Power Plant and Transmission Line Siting Committee.

This is a hearing of that Committee, and we are here to consider the application for a generating station here in Coolidge that has been made by the Coolidge Power Corporation. It is our Case No. 141.

There apparently was some confusion about the time that the hearing was supposed to start. We hope to have that confusion somewhat under control. We also have a new place, and some of our folks are having to try and locate it. So that usually takes a little time and is the reason for the delay in getting started.

We have in these hearings public participation, so I want to speak just a moment to those of you who are here as members of the public. This is an open meeting. You are welcome to be here, we appreciate your attendance. But your attendance is predicated upon your willingness to let us do our job. And that means that if you need to talk or you need to have a cellphone conversation, you need to step outside so that we will be able to continue the business of the Committee.

We are going to take breaks every 60 to 90 minutes, as needed, to let the blood run back into the

Page 90

Q. This might be an appropriate spot for you to give us just a brief clarification. In its application and the caption for this case it refers to a nominal 575 megawatt facility. Could you give us some indication of what the likely maximum output under the ambient conditions that are anticipated so that there is no confusion about whether, whenever it is on, it is going to be 575 megawatts versus some other number even though all 12 units may be operating at their capacity.

A. BY MR. HOWARD: I will take a stab at responding to that and will get kicked by Ms. Tosi if I answer it incorrectly.

Q. I think it is helpful to clarify for the record.

A. BY MR. HOWARD: The 575 megawatt number is an output that we believe the plant could achieve under the optimum ambient conditions. You know, a generating facility's output will vary with temperature, primarily temperature and elevation. And as we look at this site, its elevation, and then we look at the range of temperatures that the plant could operate under, wintertime versus summer peak, if you operate the plant at 40 degrees Fahrenheit versus 110 degrees Fahrenheit you get different output.

The 575 megawatt output looked at the climatic conditions in this area and identified what is the

Page 91

conditions that would exist that maximize the generation and what would that number be. So that's how we determined the 575 megawatts, cool winter conditions. The 512 that Marisa spoke to is under warmer conditions where the generation of the facility is lowered.

MR. MOYES: Thank you. I think that clarification may be helpful.

I believe that concludes our testimony with respect to this panel.

CHMN. FOREMAN: Perhaps now would be a convenient time to take a lunch recess.

MR. MOYES: It would.

CHMN. FOREMAN: We will break until -- and since we don't have a long journey to the food or back, we will take a one-hour break. We will start again at 1:00. And I guess we now head for the food from the galloping Canadian goose.

MR. MOYES: That's right.

(A recess ensued from 12:04 p.m. to 1:02 p.m.)

CHMN. FOREMAN: We are ready to begin the afternoon session.

Counsel, you may call your next witnesses.

MR. MOYES: Thank you, Mr. Chairman. Our next witness is Mr. Randy Schroeder. And as you requested, Mr. Chairman, in conjunction with the fact that we did

Page 92

conduct a tour of the project site as well as the Sundance facility yesterday afternoon, for the benefit of the record and those who were unable to participate in that tour, Mr. Schroeder and I, who both were on that tour and pretty much participated in all of the -- in the pointing out of things and responding to questions, have prepared a brief narrative of that event. And Mr. Schroeder will present that to you first for the record and then we will go into our environmental compatibility segment, if that's suitable.

CHMN. FOREMAN: Actually first I would like to swear him in.

MR. MOYES: Of course.

CHMN. FOREMAN: Mr. Schroeder, do you wish an oath or affirmation?

MR. SCHROEDER: Oath please.

(Randy Schroeder was duly sworn by the Chairman.)

CHMN. FOREMAN: State your full name for the record and please spell your last name for the benefit of the court reporter.

MR. SCHROEDER: Randy Schroeder, S-c-h-r-o-e-d-e-r.

CHMN. FOREMAN: Counsel, you may proceed.

MR. MOYES: Thank you, Mr. Chairman.

Page 93

RANDY SCHROEDER,

a witness herein, having been previously duly sworn by the Chairman to speak the truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOYES:

Q. Mr. Schroeder, good afternoon. Your resumé in total could be found under Tab E of Exhibit A-5, but could you just give us a brief summary of your professional qualifications and your function with respect to this project.

A. Sure. On this project I am one of the environmental consultants. I have a bachelor's and master's degree in environmental planning and management, and have over 30 years' experience in environmental permitting and planning for predominantly energy projects such as power generation projects, transmission projects and pipelines.

Q. Thank you.

And why don't you proceed with the discussion with respect to the tour that I just alluded to. And I think in addition you have answers to a couple of questions that we were unable to answer yesterday. So if you could, just present that for us, please.

Page 94

CHMN. FOREMAN: Just before you begin, let me ask that the record indicate that Member Eberhart is with us.

Proceed.

THE WITNESS: Okay. As Jay had mentioned and was previously discussed in the hearing, we did do a site tour yesterday. And the map that's up on the screen kind of shows the route that we took, and I will describe for you some of the things we looked at and saw at the various stops along that.

We started the tour here at the youth center where we are currently meeting, and drove south out of Coolidge on Highway 87. And at approximately this location, it was noted to everyone traveling in the vehicles that this is the approximate location of one of our visual simulations showing what an observer would see when traveling south out of the city on the highway when they would view the plant.

Continuing further south on 87, we crossed the under-construction Transwestern pipeline that was previously discussed. And then we turned east on Randolph Road where we stopped in the approximate location of where the access road would be coming off of the Randolph Road into the plant site.

And at this location, we were able to see a

Page 95

balloon that was tethered at the facility at the approximate location of the power island. And it was designed to approximate not only the location, but the approximate height of the stacks, taking into account the wind which we suspected would be present. We put up about 110 feet of tether, and then, when it was knocked down by the wind, or over, it was roughly 80, 85 feet off the ground. And so you could see where it would be from that location.

We also saw the compressor facility right there that's under construction by El Paso Natural Gas. Then we turned south on North Vail Road and stopped at the southeast corner of the property. And from there again we were able to observe the approximate location and height of the project as demonstrated by the balloon that was on-site.

Q. Randy, excuse me. Are you going to come back to the tanks at the old Valero site?

A. Yes. Actually I can address those now as well. One of the questions that came up was the approximate height of the tanks that are on the Valero property, the old refinery. And we went back out and checked, and they are roughly 40 feet in height. And you will see them in some of the visual simulations, and that's their relative scale. There are other facilities at the

Page 96

refinery that are 60 plus feet in height, but the tanks themselves are approximately 40.

And continuing further south -- there we go -- we then turned west on Kleck Road and went back to the highway where we continued north to the intersection of Highway 87 and Bateman Road where we pulled into the east on Bateman Road. And that gives you kind of a direct view into the project site from there as you would see it approximately from the highway and the northern part of the Randolph community.

From there we continued north and then west on Randolph Road and went to the Sundance power plant, going north just to the entrance of the plant on Tweedy Road where we stopped and looked at the Sundance facility and discussed some of the comparisons that were made earlier in testimony about the differences between Sundance and the similarities between Sundance and the proposed Coolidge generating station.

Also when we were there you were able to see, as we turned around to come back to conclude our tour, a couple of brand new homes that were being built over here just to the west of the existing power plant.

Q. And Mr. Schroeder, the questions that were posed to us with respect to the similarities of the Sundance turbines, the stacks and so forth, could you just

Page 97

clarify the response that was given to that? You may have said it but...

A. Yes. Basically, as was testified to earlier, it was discussed there at that location that the Sundance plant uses the exact same technology, the LM6000 technology and simple cycle. They have 10 units as opposed to 12 proposed for the Coolidge generating station project. Theirs are lined in a row as opposed to ours being in the back-to-back, six-by-six cluster. But most of the other facilities, the water tanks and everything else, were similar to what was being -- what is being proposed here for Coolidge.

CHMN. FOREMAN: And as I recollect, we asked to see whether or not the stack height and mass of the generating facilities at the Sundance plant were similar to the stack, planned stack height and mass of the generating facility that is proposed here. And your response to that was?

THE WITNESS: Yes, they are. Basically the mass flow out of the turbine would be exactly the same, since we were using the same technology in the same general location. The heights are, I think, both right at 85 feet. So the stacks at Sundance are the same height being proposed at Coolidge. And I am not sure if that answers your question fully or not.

CHMN. FOREMAN: By mass, we were concerned about just what the buildings or what the structure that would be the generator would look like from the side. And I recollect we had asked you whether they would look roughly the same from the side as the generator mass that would be created by the --

THE WITNESS: Yes.

CHMN. FOREMAN: -- by the generators, power generators that you are proposing.

THE WITNESS: Yes, the side view mass would be basically the same, because you have a structure housing the same generating facility, and then ended with a stack of approximately the same height.

BY MR. MOYES:

Q. And on the placemat, it is, you know, easy to see what the Chairman is referring to by way of mass there. And I believe as we responded there, they are virtually the same as, they are the same kind of equipment with the same componentry. So the answer is clearly yes to that.

I will add that I was also asked regarding the ownership of the plant. And I answered that the plant is, was constructed by PPL Global but was then sold to its current owner, Arizona Public Service Company.

We were also asked if the plant was operating,

as Mr. Howard alluded to earlier, and the answer was it was not at that moment.

CHMN. FOREMAN: Question, Member Palmer.

MEMBER PALMER: Mr. Chairman, during the site tour yesterday, Monday, we observed a crane boom that was located to the immediate west and slightly north of the proposed site.

THE WITNESS: Yes.

MEMBER PALMER: And we asked, as a visual reference, what the height of that was, because it was a little easier to judge from that than from the balloon.

THE WITNESS: Correct.

MEMBER PALMER: Did you get a height on that crane boom?

THE WITNESS: Yes, we did. I had that here to answer some of the questions that were asked. One was the crane boom. And we went back out and the people at Stinger Industries didn't know the exact height. So we went out and approximated the height. And it looked like the boom itself was about 100 feet in height, but the boom was sitting at an angle and the relative height from the ground was about 80, 85 feet.

MEMBER PALMER: So that would resemble in height appearance the stacks?

THE WITNESS: Correct. It was about the same

height as the proposed 85 foot stacks.

MEMBER PALMER: Thank you.

THE WITNESS: And then another question that was asked was exactly the interrelationships between the Transwestern pipeline, the two El Paso pipelines, and this El Paso compressor. And as Marisa talked about in her testimony, this Transwestern line does not interconnect with the El Paso system, but rather interconnects with this line that goes north from this location that's now referred to as the Phoenix lateral. And the compressor is actually used on the El Paso system to increase the capacity of their overall system.

And so the Transwestern line does not hook into the compressor, but rather the line that Transwestern would provide gas through would be a connection directly to that line, and the line that El Paso would provide gas through would be a connection to the compressor station.

MR. MOYES: Just a final detailed point because, Mr. Chairman, you asked me to do so on the record.

I also pointed out to those on the tour the series of wooden H-pole structures running north/south approximately a third of the distance back from Sundance to about the main Highway 87 and identified those as Western Area Power Administration 169kV structures

proceeding northward to the Electrical District No. 2 substation and where their offices are. I think that concludes that.

Are there any other questions with respect to the site tour matter? If not...

BY MR. MOYES:

Q. Mr. Schroeder, you are familiar with the statutory factors identified in A.R.S. 40-360.06. And this portion of the proceeding really, in my opinion, is where we really get to the legal meat of this process of determining environmental compatibility. And you as the recognized environmental expert here, unlike other witnesses, will be asked, and I am asking you, to render your professional opinion with respect to the environmental compatibility of the subject project as measured by and in reference to these various statutory factors that are mandated for consideration in this process.

If you would proceed to review those different criteria and then offer for the Committee your professional opinion with respect to that question, we would appreciate it.

A. Okay. As you can see, here is the list of factors on the slide that must be considered when issuing a CEC. I won't go over all of these now, but we

Page 114

question about what the leak detection was on the ponds. And basically there will be a dual leak detection system. First, there is a primary system that, as Ms. Tosi testified, there are two liners that will be employed so there will be a double liner system. There will be an electronic leak detection system between those two liners so that if any water escapes the first liner and gets trapped between the two, there is an electrode in there that would sense that and you would be aware of a leak before it would actually leak through the second liner.

And in addition to that there is a monitoring well requirement, that we will have a point of compliance well that we will have to continue to monitor to make sure there is no water that made its way out of the pond through the second liner or both liners to break, which is highly unlikely.

Q. Mr. Schroeder, there was a question earlier, I believe, from Ms. Noland with respect to an issue of potential toxicity of the wastewater materials that will be held in these ponds. And Mr. Howard did make a brief response. Could you comment a little more specifically with respect to that question?

A. Sure. Well, as Marisa testified, basically the constituents that would end up in the pond are the same

Page 115

constituents you have in the groundwater that will be supplying the water for the project. What happens is the water, the raw water from the wells go into this reverse osmosis system, the RO system, and the constituents in the water are rejected out, or they call it the reject water. And that's what goes to the pond. And then the pure water goes into the project's operations. And so the amount of water that goes from the RO system into the pond has the same constituents, but at a more concentrated fashion because some of the pure water has been taken out. So it is the exact same stuff that's in the groundwater, just in a more concentrated form.

Q. You and I worked -- there was a reference made to the Sundance project. You and I both worked on that project. And could you just expand on the list that Mr. Howard made as sort of a confirmation of the relative range of TDS and consistent -- or constituency that we are talking about here as it relates to the irrigation water that's used on the farms around here?

A. I don't have the numbers of the various constituents, but basically it would be cycled up in concentration maybe approximately 10 times, something like that, as opposed to what the concentrations would be in the raw water.

Page 116

Q. Thank you.

A. And then the next factor is compliance with other ordinances, plans, and regulations. As we talked about earlier, it does comply with the city and county planning and zoning. It complies with all the regulations, as we mentioned, from the county. We are going to be getting the air permit from the air district. It will comply with all the state regulations, the APP program, as well as all of the other state regulations that apply to bringing the water to the project, the water emissions, and so on, so forth, and will also comply with all the local building permits and code requirements that would be necessitated before the construction permits would be granted.

And that's the end of the environmental compatibility section.

Q. Mr. Schroeder, could you then again state for us in your professional opinion whether or not this Committee would be on solid ground, in your opinion, if it were to reach a finding of fact and a conclusion of law that concluded that this project does qualify for a Certificate of Environmental Compatibility as measured at least by these statutory standards?

A. Yes. As I mentioned, as I walked through each of the standards, the project is very compliant with all

Page 117

of them and would be very compatible, environmentally compatible for the proposed use.

MR. MOYES: Thank you.

That concludes our direct testimony from this witness, and we would tender him for cross-examination and Committee questioning.

CHMN. FOREMAN: All right. Any cross-examination from Staff?

MS. ALWARD: Chairman, Committee members, before Staff conducts its cross-examination, it appeared from the direct testimony of this witness that concerns were raised about the siting tour yesterday related to any off-the-record discussions between the applicant and the Committee. And before those matters are raised or discussed more fully, I would like to take just a five-minute break to talk to the applicant to see how what happened yesterday comports with the open meeting law and the ex parte rule.

I wasn't sure how the tour was actually conducted, whether there was a tape recording or court reporter. But at least at first blush as I heard this witness discuss the give and take between the Committee members that were present and the applicant, it raised some concerns. And before we pursue those I would just like to have a chance to talk to the counsel.

Page 118

CHMN. FOREMAN: Sure. Take a break.
MS. ALWARD: Thank you.
MR. MOYES: Thank you.
(A recess ensued from 1:40 p.m. to 1:52 p.m.)
CHMN. FOREMAN: Could I get counsel to resume their seats, please.
Counsel, you had expressed some concerns.
MS. ALWARD: Chairman, Committee members, yes. And counsel and I have had some off-the-record discussion, and I believe he is going to ask permission to ask his witness a few follow-up questions to clarify the record.
CHMN. FOREMAN: Great.
Counsel.
MR. MOYES: Thank you, Mr. Chairman.
BY MR. MOYES:
Q. Mr. Schroeder, let's revisit. We have had some earlier discussion with respect to matters that were discussed between those members of the Committee who participated in the tour that was undertaken pursuant to the Chairman's procedural order in this matter. At the time of those conversations -- and I wouldn't, I don't characterize them as conversations, because I was there; I will let you characterize them how you see them -- when the questions were asked you by the Committee

Page 119

members and you or I responded and answered those questions, there was at that time no recording. So if we had failed to raise those items and make them part of the record of this proceeding, they would have been determined to be off-the-record communications. It is for that purpose that we have a few moments ago and we will now further address those items so that they become part of the recording of this proceeding, which is taking place both auditorily and in writing by the court reporter.
I will say and confirm with you that those audio recordings and the transcript of this proceeding will be made available and they constitute the record in this proceeding. Within three days, as ordered by the Chairman, the audio tapes of this proceeding will be available in the Coolidge Public Library as well as in the Casa Grande Public Library. Within 10 days the court reporter service will make available to us written transcripts of this proceeding. And those will likewise be filed with the Corporation Commission and will be made publicly available. And I will say that anyone who wishes can come to my offices in Phoenix as well to view those transcripts. And they will also be made available to persons who wish to purchase the transcripts.
But let me, in connection with that, ask you

Page 120

again in more specific terms whether there were any additional questions presented by members of the Committee during that tour or answers given that we did not address in the discussion that you led us through a few moments ago on the record.
A. No, not that I am aware of. I think we covered all of those in the previous testimony.
MR. MOYES: Thank you. I will affirm for the record myself, since I was a participant in that proceeding, in that tour, and did respond to the questions that you identified, that that is my affirmation as well. And I will say on behalf of the applicant and myself, as counsel responsible for these kinds of matters, that we were meticulously careful in reciting, and even as I did volunteer things like the point about the double H structure transmission line, just as a point of information, I did identify that on the record.
So it is our position -- and, Mr. Schroeder, I will ask you again to confirm this if you agree -- that all of those communications have now been made part of the record of this proceeding, and therefore do not now constitute off-the-record communications between representatives of the applicant and members of the Committee.

Page 121

BY MR. MOYES:
Q. Again, are there any other items that you think need to be made part of the record as it relates to the questions that were asked or the answers that were provided during the course of the tour that we undertook pursuant to the procedural order in this case?
A. No, there are no other items. I just looked through the notes that I had here in front of me, and I think we covered all of them in the verbal testimony.
Q. And do those notes also reflect my notes that I took --
A. Yes.
Q. -- promptly subsequent to that tour and presented to you for purposes of preparation of your testimony in this respect?
A. Yes, they do.
MR. MOYES: Thank you.
Mr. Chairman, do you have any questions of us in connection with this issue?
CHMN. FOREMAN: Well, and I gleaned from this that there is a question concerning the legitimacy of what was done yesterday during the tour that has now been raised by counsel for the intervenor. So I think it is appropriate for the Chair to review its recollection of what occurred.

Page 122

There were five members of the Committee on the tour; in addition to the Chair, Member Haenichen, Member McGuire, Member Palmer, Member Rasmussen. We were taken in one van. There was a driver whose name I am sorry I do not remember who, I think, may have spoken to us once during that time period.

We stopped at the locations that have been described in the testimony. The members of the Committee wanted to know where we were at, where was the location of the property that was depicted in the application. There were questions about the height of structures that were close by. There were questions about the height of structures that were close by in relationship to proposed objects that would be on the the proposal that was in the application, and a request repeatedly to provide answers to those questions on the record today at the hearing to direct counsel as to what information should be prepared and placed on the record in public, in the hearing so that that information could be a part of the record that the Committee could use to make its decision in this case.

There was absolutely no discussion of any contested issue that relates to this case. There was absolutely no -- I heard absolutely no expression of opinion by any member with regard to any contested issue

Page 123

in this case. I heard only questions concerning where we were at, what we were viewing, and how this related to the material that was in the application, questions that, frankly, needed to be answered in order for the tour to have any meaning, and an attempt, repeated attempt, that I thought was complied with to make sure that the answers to those questions would be placed on the public record before the public during this meeting.

Is there any member of the Committee that would like to elaborate or have a *different* recollection?

Member Haenichen.

MEMBER HAENICHEN: No. I would just like to say that all of us that did the tour prior to going on the tour were admonished by the Chairman not to have any discussions about anything having to do with this case other than things we would see on the tour and where we were. And this is a common practice for these types of hearings, and we are all, I think, very sensitive to that. And we just don't do it.

MR. MOYES: Mr. Chairman, if I may, we --

CHMN. FOREMAN: Yes.

MR. MOYES: I apologize. I didn't mean to cut off any responsive comment.

CHMN. FOREMAN: I was just checking. I don't believe there are any other responses the Committee

Page 124

wants to make.

MR. MOYES: It may be helpful and relevant for the record in this to refresh the fact that the notice of hearing that was docketed in this matter pursuant to statute and published, not just in one local newspaper but in two local newspapers, did contain as part of the notice of this proceeding the fact that the Committee, quote, may conduct a tour of the project site on Monday, September 29, 2008.

It goes on to reflect the fact that the tour would commence here, that members of the public may follow the Committee on the tour in their own private vehicles, and then the final sentence of this portion of the notice, during the tour the Committee will not deliberate in any manner concerning the merits of the application or the project.

I can affirm my personal observation that in my hearing, certainly, there were no such deliberations, and I believe the Committee members can speak for themselves in that respect.

CHMN. FOREMAN: I would just ask that if counsel believes that anything approaching a violation of the open meetings law occurred, I would like for you to specify factually and legally the basis for your concern in writing and file it with the Committee and as a part

Page 125

of the docket in this case.

MR. MOYES: Let me just add finally that I do appreciate Ms. Alward's sensitivity to this issue and raising the issue, because we wish to make sure that there are no defects in the record in this case or otherwise that would provide a defect.

We have tried to approach this proceeding from every aspect in strict compliance with the law, as well as with the spirit of the law, which is to provide this Committee with the substance and detail of information that's necessary for it to discharge its responsibility in determining the focal question of all of these proceedings, which is, is the construction of the proposed facility at this site compatible with the environment. And it is in that spirit that we have proceeded. And certainly we do not wish to do anything that would create any defect in the record from a legal standpoint. And it is our intention and attempt, and I think we have succeeded, at placing on the record all of those things that are necessary to comply with that objective.

CHMN. FOREMAN: Anything else we need to discuss here before we proceed?

MS. ALWARD: Chairman, Committee members, and counsel, thank you for the opportunity to let me discuss

Page 126

this matter off the record with counsel. There was some concerns raised during the direct testimony that left me uneasy. At this point I simply don't have enough information to form any kind of opinion. I appreciate counsel clarifying the record as to what actually happened yesterday and the questions that were asked. I think it goes a long way for the witness to have avowed under oath that all the disclosures have been made.

CHMN. FOREMAN: Do you know of any evidence or any information anyplace else that would help you in your thinking in this regard that has not been made available to you?

MS. ALWARD: Chairman, Committee members, and counsel, the only thing I haven't reviewed is the actual notice or the protocol for the tour, and how the public was made aware and made available to attend what I would consider an open meeting. And that part I just haven't had a chance to look at yet.

CHMN. FOREMAN: All right. I intend to proceed.

MR. MOYES: Thank you.

CHMN. FOREMAN: Ready to go?

MR. MOYES: We will assume, then, there is no further cross-examination of Mr. Schroeder?

CHMN. FOREMAN: Any cross-examination of Mr. Schroeder? I don't think we got to --

Page 127

MS. ALWARD: We didn't get to cross-examination. I am going to turn it over to Ms. Scott. I am not sure if she has any questions.

CHMN. FOREMAN: All right.

MS. SCOTT: I think I actually have only one or two questions in this area.

CROSS-EXAMINATION

BY MS. SCOTT:

Q. I believe that currently the air permit that's pending is for a minor source permit?

A. That's correct.

Q. And we have had a lot of comparisons with the Sundance facility, which is very similar. And I believe in the application it stated Sundance was a major source and so was subject to the best practices. Can you comment why that was different than this project?

A. Correct, Sundance was permitted as a major source, the reason being it was a merchant plant and its goal in obtaining an air permit was to maximize the number of hours it could run. And so the air permit for the Sundance project was based on the 8,760 hours of available time in a year, and the number of hours of that that would be required for starts and stops, and the run hours remaining that would be left for

Page 128

operations of the facility. And that put them over the 250 ton a year threshold, which required them to get a major source permit.

Q. Thank you.

Just one other question. In regards to the cultural resources survey, it was indicated that the Class III survey has been done.

A. Yes.

Q. There was not a lot of concern on this particular parcel because of its history of being agriculturally used for many years. I wondered if you had a feel, based on your experience and other projects, the difference between the depth and the extent of the disturbance from agricultural activities compared to the construction that will be occurring, for instance, the 12 foot deep evaporation ponds.

A. Sure.

Q. Do you have any kind of sense of how likely it might be that an archeological or historical source might be found once that sort of construction begins?

A. In answer to the first part of that question, normally the plow layer on agricultural lands goes anywhere from 18 to 24 inches in depth, sometimes deeper depending on the activities that each individual farmer uses. And so the potential for there to be artifacts

Page 129

below that layer, you know, there is potential in that undisturbed portion that there are things there.

And that's why there is that requirement that when construction occurs -- well, to further answer that question, therefore, in doing the excavation required particularly for the ponds and some of the other facilities, like building foundations and whatnot, you will be digging deeper than that, and that's why there is the requirement that you would basically monitor those excavations. And if anything was found, as Mr. Moyes had indicated, construction would be stopped and the appropriate mitigation would be done in consultation with SHPO's office.

MS. SCOTT: Thank you. I have no other questions.

CHMN. FOREMAN: Do we have questions from Committee members?

MEMBER WONG: I have some questions.

CHMN. FOREMAN: Member Wong.

MEMBER WONG: Thank you, Mr. Chairman.

EXAMINATION

BY MEMBER WONG:

Q. Questions specifically on, let's talk about the pond. You mentioned that you had an alert system.

Page 14

terrain that would incur construction phased damages or scars that would require the rehabilitation or revegetation.

But what this project site does have makes it a uniquely ideal location for this project: 100 acres of land historically tilled, leveled, and cultivated for many decades, yet already zoned for industrial purposes lying within an even larger designated industrial area; immediate access to three pipelines supplied by two separate natural gas transporters; and an adjacent new high voltage transmission system that's under construction on a corridor that you have previously approved and designated; and an adjacent railway; easy existing highway access; an abundant on-site water source with a usage history that provides us opportunity for net water conservation through development of the project; and other established and expanding industrial facilities in the neighborhood. It has a supportive local government and citizenry. In a word, actually two words, this site to me defines environmental compatibility.

The project in total also presents, I think, the definition of what we would call a simple project. Its technology is even characterized by the term simple cycle. For those members who served during the Sundance

Page 15

Energy case or the most recent Northern Energy case, both of which I had the privilege of participating in, the technology and equipment of this project is virtually the same.

There would be no steam turbine nor the associated large cooling towers or relatively high water consumption of a steam generator. The project's gas turbine generators will use substantially less water annually than the irrigation crops on the project's sites have used over many decades, yet even that water use will have been replenished in advance by recharging renewable CAP water. And I am happy to say that CAP water is in fact flowing in the local canals today as we speak. It began on Saturday.

This project is not a merchant facility hoping to find sales in the competitive open marketplace. Salt River Project is paying for this plant's entire capacity and energy output. And it is doing so only because it needs it to reliably serve its customers.

Further, and importantly, the value of these peaking generators to Arizona's electric system is substantial even when the generators are not running. How? Because these particular gas turbine generators provide standby reserve capacity capable of responding within ten minutes to daily and seasonal peak power

Page 16

requirements, or to a sudden shortfall in other generation. This capability makes gas-fired peaking plants like this project vital to the integration and firming of renewable resources such as solar and wind.

You heard much testimony last week about this important reality, relationship in your first solar project hearing. We think that there are many opportunities for win/win complementary existence and necessity of complementary existence to both gas-fired peaking plants and renewable resources. What is good for the goose is good for the gander in this case.

In order for renewable resources to expand to dependably serve a significant percentage of Arizona's electric utility load on a reliable, large scale basis, hour by hour, day by day, year round, standby peaking and firming capacity like the Coolidge generating station is absolutely essential. And when this project does run, which will likely be for only a small fraction of the hours in a year, it will burn clean natural gas. It is the most efficient, cost effective, and environmentally friendly alternative for new peaking and reserve resources that can still be developed in Arizona. And I say this because I think we have all agreed that the prospect of substantial new hydro power resources in the state is virtually nonexistent.

Page 17

This kind of peaking generation to complement base-load and renewable resources will reduce the need for additional coal-fired generation to meet Arizona's growing electric load.

Now, you have all received a copy of the application, a large white binder that was delivered to you some time back. You have also in front of you this morning a binder of the exhibits, some or all of which we may used in presenting our case today. The application contains extensive detail which we will not repeat here in our testimony. But if your review raised questions about details in the application, we will gladly address them.

For time efficiency and with the Chairman's permission I will forego asking very many formalistic questions to elicit responses from our witnesses. Rather, their testimony will proceed largely in narrative presentation format, following the outlines contained in your exhibit notebook under Tab A-5. And we will address that a little further in a moment.

We will present three segments of testimony. The first segment will be a panel format with three witnesses. The other two segments will have a single witness each. We also have in the room additional project team personnel with technical expertise with

Attachment 2

38-431. Definitions

In this article, unless the context otherwise requires:

1. "Advisory committee" or "subcommittee" means any entity, however designated, that is officially established, on motion and order of a public body or by the presiding officer of the public body, and whose members have been appointed for the specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body.
2. "Executive session" means a gathering of a quorum of members of a public body from which the public is excluded for one or more of the reasons prescribed in section 38-431.03. In addition to the members of the public body, officers, appointees and employees as provided in section 38-431.03 and the auditor general as provided in section 41-1279.04, only individuals whose presence is reasonably necessary in order for the public body to carry out its executive session responsibilities may attend the executive session.
3. "Legal action" means a collective decision, commitment or promise made by a public body pursuant to the constitution, the public body's charter, bylaws or specified scope of appointment and the laws of this state.
4. "Meeting" means the gathering, in person or through technological devices, of a quorum of members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to such action.
5. "Political subdivision" means all political subdivisions of this state, including without limitation all counties, cities and towns, school districts and special districts.
6. "Public body" means the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, the public body.
7. "Quasi-judicial body" means a public body, other than a court of law, possessing the power to hold hearings on disputed matters between a private person and a public agency and to make decisions in the general manner of a court regarding such disputed claims.

38-431.01. Meetings shall be open to the public

A. All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. All legal action of public bodies shall occur during a public meeting.

B. All public bodies shall provide for the taking of written minutes or a recording of all their meetings, including executive sessions. For meetings other than executive sessions, such minutes or recording shall include, but not be limited to:

1. The date, time and place of the meeting.
2. The members of the public body recorded as either present or absent.
3. A general description of the matters considered.
4. An accurate description of all legal actions proposed, discussed or taken, and the names of members who propose each motion. The minutes shall also include the names of the persons, as given, making statements or presenting material to the public body and a reference to the legal action about which they made statements or presented material.

C. Minutes of executive sessions shall include items set forth in subsection B, paragraphs 1, 2 and 3 of this section, an accurate description of all instructions given pursuant to section 38-431.03, subsection A, paragraphs 4, 5 and 7 and such other matters as may be deemed appropriate by the public body.

D. The minutes or a recording of a meeting shall be available for public inspection three working days after the meeting except as otherwise specifically provided by this article.

E. A public body of a city or town with a population of more than two thousand five hundred persons shall:

1. Within three working days after a meeting, except for subcommittees and advisory committees, post on its internet website, if applicable, either:

(a) A statement describing the legal actions taken by the public body of the city or town during the meeting.

(b) Any recording of the meeting.

2. Within two working days following approval of the minutes, post approved minutes of city or town council meetings on its internet website, if applicable, except as otherwise specifically provided by this article.
3. Within ten working days after a subcommittee or advisory committee meeting, post on its internet website, if applicable, either:

(a) A statement describing legal action, if any.

(b) A recording of the meeting.

F. All or any part of a public meeting of a public body may be recorded by any person in attendance by means of a tape recorder or camera or any other means of sonic reproduction, provided that there is no active interference with the conduct of the meeting.

G. The secretary of state for state public bodies, the city or town clerk for municipal public bodies and the county clerk for all other local public bodies shall distribute open meeting law materials prepared and approved by the attorney general to a person elected or appointed to a public body prior to the day that person takes office.

H. A public body may make an open call to the public during a public meeting, subject to reasonable time, place and manner restrictions, to allow individuals to address the public body on any issue within the jurisdiction of the public body. At the conclusion of an open call to the public, individual members of the public body may respond to criticism made by those who have addressed the public body, may ask staff to review a matter or may ask that a matter be put on a future agenda. However, members of the public body shall not discuss or take legal action on matters raised during an open call to the public unless the matters are properly noticed for discussion and legal action.

I. A member of a public body shall not knowingly direct any staff member to communicate in violation of this article.

38-431.02. Notice of meetings

A. Public notice of all meetings of public bodies shall be given as follows:

1. The public bodies of the state shall file a statement with the secretary of state stating where all public notices of their meetings will be posted and shall give such additional public notice as is reasonable and practicable as to all meetings.

2. The public bodies of the counties, school districts and other special districts shall file a statement with the clerk of the board of supervisors stating where all public notices of their meetings will be posted and shall give such additional public notice as is reasonable and practicable as to all meetings.

3. The public bodies of the cities and towns shall file a statement with the city clerk or mayor's office stating where all public notices of their meetings will be posted and shall give such additional public notice as is reasonable and practicable as to all meetings.

4. The public bodies of the cities and towns that have an internet web site shall post all public notices of their meetings on their internet web site and shall give additional public notice as is reasonable and practicable as to all meetings. A technological problem or failure that either prevents the posting of public notices on a city or town web site or that temporarily or permanently prevents the usage of all or part of the web site does not preclude the holding of the meeting for which the notice was posted if all other public notice requirements required by this section are complied with.

B. If an executive session will be held, the notice shall be given to the members of the public body, and to the general public, stating the specific provision of law authorizing the executive session.

C. Except as provided in subsections D and E, meetings shall not be held without at least twenty-four hours' notice to the members of the public body and to the general public.

D. In case of an actual emergency, a meeting, including an executive session, may be held on such notice as is appropriate to the circumstances. If this subsection is utilized for conduct of an emergency session or the consideration of an emergency measure at a previously scheduled meeting the public body must post a public notice within twenty-four hours declaring that an emergency session has been held and setting forth the information required in subsections H and I.

E. A meeting may be recessed and resumed with less than twenty-four hours' notice if public notice of the initial session of the meeting is given as required in subsection A, and if, prior to recessing, notice is publicly given as to the time and place of the resumption of the meeting or the method by which notice shall be publicly given.

F. A public body that intends to meet for a specified calendar period, on a regular day, date or event during such calendar period, and at a regular place and time, may post public notice of such meetings at the beginning of such period. Such notice shall specify the period for which notice is applicable.

G. Notice required under this section shall include an agenda of the matters to be discussed or decided at the meeting or information on how the public may obtain a copy of such an agenda. The agenda must be available to the public at least twenty-four hours prior to the meeting, except in the case of an actual emergency under subsection D.

H. Agendas required under this section shall list the specific matters to be discussed, considered or decided at the meeting. The public body may discuss, consider or make decisions only on matters listed on the agenda and other matters related thereto.

I. Notwithstanding the other provisions of this section, notice of executive sessions shall be required to include only a general description of the matters to be considered. Such agenda shall provide more than just a recital of the statutory provisions authorizing the executive session, but need not contain information that would defeat the purpose of the executive session, compromise the legitimate privacy interests of a public officer, appointee or employee, or compromise the attorney-client privilege.

J. Notwithstanding subsections H and I, in the case of an actual emergency a matter may be discussed and considered and, at public meetings, decided, where the matter was not listed on the agenda provided that a statement setting forth the reasons necessitating such discussion, consideration or decision is placed in the minutes of the meeting and is publicly announced at the public meeting. In the case of an executive session, the reason for consideration of the emergency measure shall be announced publicly immediately prior to the executive session.

K. Notwithstanding subsection H, the chief administrator, presiding officer or a member of a public body may present a brief summary of current events without listing in the agenda the specific matters to be summarized, provided that:

1. The summary is listed on the agenda.

2. The public body does not propose, discuss, deliberate or take legal action at that meeting on any matter in the summary unless the specific matter is properly noticed for legal action.

38-431.03. Executive sessions

A. Upon a public majority vote of the members constituting a quorum, a public body may hold an executive session but only for the following purposes:

1. Discussion or consideration of employment, assignment, appointment, promotion, demotion, dismissal, salaries, disciplining or resignation of a public officer, appointee or employee of any public body, except that, with the exception of salary discussions, an officer, appointee or employee may demand that the discussion or consideration occur at a public meeting. The public body shall provide the officer, appointee or employee with written notice of the executive session as is appropriate but not less than twenty-four hours for the officer, appointee or employee to determine whether the discussion or consideration should occur at a public meeting.

2. Discussion or consideration of records exempt by law from public inspection, including the receipt and discussion of information or testimony that is specifically required to be maintained as confidential by state or federal law.

3. Discussion or consultation for legal advice with the attorney or attorneys of the public body.

4. Discussion or consultation with the attorneys of the public body in order to consider its position and instruct its attorneys regarding the public body's position regarding contracts that are the subject of negotiations, in pending or contemplated litigation or in settlement discussions conducted in order to avoid or resolve litigation.

5. Discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations with employee organizations regarding the salaries, salary schedules or compensation paid in the form of fringe benefits of employees of the public body.

6. Discussion, consultation or consideration for international and interstate negotiations or for negotiations by a city or town, or its designated representatives, with members of a tribal council, or its designated representatives, of an Indian reservation located within or adjacent to the city or town.

7. Discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations for the purchase, sale or lease of real property.

B. Minutes of and discussions made at executive sessions shall be kept confidential except from:

1. Members of the public body which met in executive session.

2. Officers, appointees or employees who were the subject of discussion or consideration pursuant to subsection A, paragraph 1 of this section.

3. The auditor general on a request made in connection with an audit authorized as provided by law.

4. A county attorney or the attorney general when investigating alleged violations of this article.

C. The public body shall instruct persons who are present at the executive session regarding the confidentiality requirements of this article.

D. Legal action involving a final vote or decision shall not be taken at an executive session, except that the public body may instruct its attorneys or representatives as provided in subsection A, paragraphs 4, 5 and 7 of this section. A public vote shall be taken before any legal action binds the public body.

E. Except as provided in section 38-431.02, subsections I and J, a public body shall not discuss any matter in an executive session which is not described in the notice of the executive session.

F. Disclosure of executive session information pursuant to this section or section 38-431.06 does not constitute a waiver of any privilege, including the attorney-client privilege. Any person receiving executive session information pursuant to this section or section 38-431.06 shall not disclose that information except to the attorney general or county attorney, by agreement with the public body or to a court in camera for purposes of enforcing this article. Any court that reviews executive session information shall take appropriate action to protect privileged information.

38-431.04. Writ of mandamus

Where the provisions of this article are not complied with, a court of competent jurisdiction may issue a writ of mandamus requiring that a meeting be open to the public.

38-431.05. Meeting held in violation of article; business transacted null and void; ratification

A. All legal action transacted by any public body during a meeting held in violation of any provision of this article is null and void except as provided in subsection B.

B. A public body may ratify legal action taken in violation of this article in accordance with the following requirements:

1. Ratification shall take place at a public meeting within thirty days after discovery of the violation or after such discovery should have been made by the exercise of reasonable diligence.

2. The notice for the meeting shall include a description of the action to be ratified, a clear statement that the public body proposes to ratify a prior action and information on how the public may obtain a detailed written description of the action to be ratified.

3. The public body shall make available to the public a detailed written description of the action to be ratified and all deliberations, consultations and decisions by members of the public body that preceded and related to such action. The written description shall also be included as part of the minutes of the meeting at which ratification is taken.

4. The public body shall make available to the public the notice and detailed written description required by this section at least seventy-two hours in advance of the public meeting at which the ratification is taken.

38-431.06. Investigations; written investigative demands

A. On receipt of a written complaint signed by a complainant alleging a violation of this article or on their own initiative, the attorney general or the county attorney for the county in which the alleged violation occurred may begin an investigation.

B. In addition to other powers conferred by this article, in order to carry out the duties prescribed in this article, the attorney general or the county attorney for the county in which the alleged violation occurred, or their designees, may:

1. Issue written investigative demands to any person.
2. Administer an oath or affirmation to any person for testimony.
3. Examine under oath any person in connection with the investigation of the alleged violation of this article.
4. Examine by means of inspecting, studying or copying any account, book, computer, document, minutes, paper, recording or record.
5. Require any person to file on prescribed forms a statement or report in writing and under oath of all the facts and circumstances requested by the attorney general or county attorney.

C. The written investigative demand shall:

1. Be served on the person in the manner required for service of process in this state or by certified mail, return receipt requested.
2. Describe the class or classes of documents or objects with sufficient definiteness to permit them to be fairly identified.
3. Prescribe a reasonable time at which the person shall appear to testify and within which the document or object shall be produced and advise the person that objections to or reasons for not complying with the demand may be filed with the attorney general or county attorney on or before that time.
4. Specify a place for the taking of testimony or for production of a document or object and designate a person who shall be the custodian of the document or object.

D. If a person objects to or otherwise fails to comply with the written investigation demand served on the person pursuant to subsection C, the attorney general or county attorney may file an action in the superior court for an order to enforce the demand. Venue for the action to enforce the demand shall be in Maricopa county or in the county in which the alleged violation occurred. Notice of hearing the action to enforce the demand and a copy of the action shall be served on the person in the same manner as that prescribed in the Arizona rules of civil procedure. If a court finds that the demand is proper, including that the compliance will not violate a privilege and that there is not a conflict of interest on the part of the attorney general or county attorney, that there is reasonable cause to believe there may have been a violation of this article and that the information sought or document or object demanded is relevant to the violation, the court shall order the person to comply with the demand, subject to modifications the court may prescribe. If the person fails to comply with the court's order, the court may issue any of the following orders until the person complies with the order:

1. Adjudging the person in contempt of court.
2. Granting injunctive relief against the person to whom the demand is issued to restrain the conduct that is the subject of the investigation.
3. Granting other relief the court deems proper.

38-431.07. Violations; enforcement; removal from office; in camera review

A. Any person affected by an alleged violation of this article, the attorney general or the county attorney for the county in which an alleged violation of this article occurred may commence a suit in the superior court in the county in which the public body ordinarily meets, for the purpose of requiring compliance with, or the prevention of violations of, this article, by members of the public body, or to determine the applicability of this article to matters or legal actions of the public body. For each violation the court may impose a civil penalty not to exceed five hundred dollars against a person who violates this article or who knowingly aids, agrees to aid or attempts to aid another person in violating this article and order such equitable relief as it deems appropriate in the circumstances. The civil penalties awarded pursuant to this section shall be deposited into the general fund of the public body concerned. The court may also order payment to a successful plaintiff in a suit brought under this section of the plaintiff's reasonable attorney fees, by the defendant state, the political subdivision of the state or the incorporated city or town of which the public body is a part or to which it reports. If the court determines that a public officer with intent to deprive the public of information violated any provision of this article the court may remove the public officer from office and shall assess the public officer or a person who knowingly aided, agreed to aid or attempted to aid the public officer in violating this article, or both, with all of the costs and attorney fees awarded to the plaintiff pursuant to this section.

B. A public body shall not expend public monies to employ or retain legal counsel to provide legal services or representation to the public body or any of its officers in any legal action commenced pursuant to any provisions of this article, unless the public body has authority to make such expenditure pursuant to other provisions of law and takes a legal action at a properly noticed open meeting approving such expenditure prior to incurring any such obligation or indebtedness.

C. In any action brought pursuant to this section challenging the validity of an executive session, the court may review in camera the minutes of the executive session, and if the court in its discretion determines that the minutes are relevant and that justice so demands, the court may disclose to the parties or admit in evidence part or all of the minutes.

38-431.08. Exceptions; limitation

A. This article does not apply to:

1. Any judicial proceeding of any court or any political caucus of the legislature.
2. Any conference committee of the legislature, except that all such meetings shall be open to the public.
3. The commissions on appellate and trial court appointments and the commission on judicial qualifications.
4. Good cause exception determinations and hearings conducted by the board of fingerprinting pursuant to section 41-619.55.

B. A hearing held within a prison facility by the board of executive clemency is subject to this article, except that the director of the state department of corrections may:

1. Prohibit, on written findings that are made public within five days of so finding, any person from attending a hearing whose attendance would constitute a serious threat to the life or physical safety of any person or to the safe, secure and orderly operation of the prison.
2. Require a person who attends a hearing to sign an attendance log. If the person is over sixteen years of age, the person shall produce photographic identification which verifies the person's signature.
3. Prevent and prohibit any articles from being taken into a hearing except recording devices, and if the person who attends a hearing is a member of the media, cameras.
4. Require that a person who attends a hearing submit to a reasonable search on entering the facility.

C. The exclusive remedies available to any person who is denied attendance at or removed from a hearing by the director of the state department of corrections in violation of this section shall be those remedies available in section 38-431.07, as against the director only.

D. Either house of the legislature may adopt a rule or procedure pursuant to article IV, part 2, section 8, Constitution of Arizona, to provide an exemption to the notice and agenda requirements of this article or to allow standing or conference committees to meet through technological devices rather than only in person.

38-431.09. Declaration of public policy

A. It is the public policy of this state that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. Toward this end, any person or entity charged with the interpretations of this article shall construe this article in favor of open and public meetings.

B. Notwithstanding subsection A, it is not a violation of this article if a member of a public body expresses an opinion or discusses an issue with the public either at a venue other than at a meeting that is subject to this article, personally, through the media or other form of public broadcast communication or through technological means if:

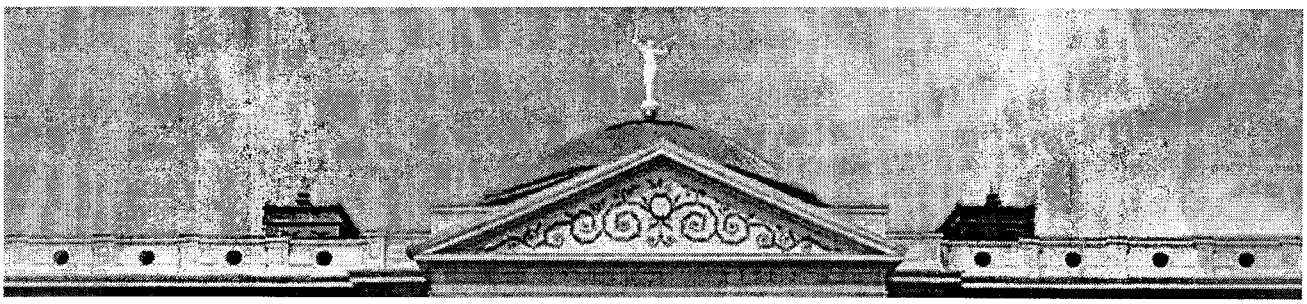
1. The opinion or discussion is not principally directed at or directly given to another member of the public body.

2. There is no concerted plan to engage in collective deliberation to take legal action.

Attachment 3

Arizona State Legislature

Bill Number Search:



Forty-eighth Legislature - Second Regular Session

change session | printer friendly version | site map | email

Senate House Legislature Bills Committees Statutes Executive Calendars News

ARS TITLE PAGE NEXT DOCUMENT PREVIOUS DOCUMENT

40-360. Definitions

In this article, unless the context otherwise requires:

1. "Area of jurisdiction" means the state, a county or an incorporated city or town which exercises concurrent or exclusive jurisdiction over a geographical area.
2. "Certificate of environmental compatibility" means the certificate required by this article which evidences the approval by the state of the sites for a plant or transmission line or both.
3. "Commission" means the Arizona corporation commission.
4. "Committee" means the powerplant and transmission line siting committee.
5. "Current Arizona electric transmission system" means the existing electric transmission system serving this state and all transmission lines on file with the commission as of January 31 of the previous year.
6. "Facilities" means a plant, transmission line or both.
7. "Member" means the state official named herein, the employee designee thereof from the department, agency or governing body of such state official member and the public members designated herein.
8. "Person" means any state or agency or political subdivision thereof, or any individual, partnership, joint venture, corporation, city or county, whether located within or without this state, or any combination of such entities.
9. "Plant" means each separate thermal electric, nuclear or hydroelectric generating unit with a nameplate rating of one hundred megawatts or more for which expenditures or financial commitments for land acquisition, materials, construction or engineering in excess of fifty thousand dollars have not been made prior to August 13, 1971.
10. "Transmission line" means a series of new structures erected above ground and supporting one or more conductors designed for the transmission of electric energy at nominal voltages of one hundred fifteen thousand volts or more and all new switchyards to be used therewith and related thereto for which expenditures or financial commitments for land acquisition, materials, construction or engineering in excess of fifty thousand dollars have not been made prior to August 13, 1971.
11. "Utility" means any person engaged in the generation or transmission of electric energy.

40-360.01. Organization and membership of the committee

A. The commission shall establish a power plant and transmission line siting committee of Arizona.

B. The committee shall consist of the following members:

1. State attorney general or the attorney general's designee.
2. Director of environmental quality or the director's designee.
3. Director of water resources or the director's designee.
4. Director of the energy office of the department of commerce or the director's designee.
5. Chairman of the Arizona corporation commission or the chairman's designee.
6. Six members appointed by the commission to serve for a term of two years of which three members shall represent the public, one member shall represent incorporated cities and towns, one member shall represent counties and one member shall be actively engaged in agriculture.

C. The attorney general or the attorney general's designee shall be chairman of the committee.

D. The commission shall establish such procedures as provide for expeditious review of the proposed siting plans and necessary consultation with the person proposing the facilities, for noticing and conducting the hearing provided by section 40-360.04, and for a timely decision regarding the issuance of a certificate of environmental compatibility of the proposed site.

E. Committee members appointed by the commission are eligible to receive compensation of two hundred dollars for each meeting attended, prorated for partial days for each meeting attended, payable from the filing fee required by section 40-360.09. Committee members employed by government entities are not eligible to receive compensation for their services. All committee members shall be reimbursed from the filing fee required by section 40-360.09 for their actual and necessary expenses incurred in connection with their participation in committee meetings.

F. The committee may utilize the staff resources of its constituent agencies as well as necessary consultants. All studies required by the committee shall be conducted as specified by the committee and under its general direction.

40-360.02. Plans; filing; failure to comply; classification

A. Every person contemplating construction of any transmission line within the state during any ten year period shall file a ten year plan with the commission on or before January 31 of each year.

B. Every person contemplating construction of any plant within the state shall file a plan with the commission ninety days before filing an application for a certificate of environmental compatibility as provided in section 40-360.03.

C. Each plan filed pursuant to subsection A or B of this section shall set forth the following information with respect to the proposed facilities to the extent such information is available:

1. The size and proposed route of any transmission lines or location of each plant proposed to be constructed.
2. The purpose to be served by each proposed transmission line or plant.
3. The estimated date by which each transmission line or plant will be in operation.
4. The average and maximum power output measured in megawatts of each plant to be installed.
5. The expected capacity factor for each proposed plant.
6. The type of fuel to be used for each proposed plant.
7. The plans for any new facilities shall include a power flow and stability analysis report showing the effect on the current Arizona electric transmission system. Transmission owners shall provide the technical reports, analysis or basis for projects that are included for serving customer load growth in their service territories.

D. The information in the plan reported to the commission in subsection B of this section is not open to public inspection and shall not be made public if disclosure of the information in the plan could give a material advantage to competitors. The information in the plan protected as confidential under subsection B of this section is any information that is similar to the information that would be confidential under section 40-204. An officer or employee of the commission who knowingly divulges information in the plan in violation of this subsection is guilty of a class 2 misdemeanor.

E. Failure of any person to comply with the requirements of subsection A, B or C of this section may, in the commission's discretion in the absence of a showing of good cause, constitute a ground for refusing to consider an application of such person.

F. The plans shall be recognized and utilized as tentative information only and are subject to change at any time at the discretion of the person filing the plans.

G. The plans shall be reviewed biennially by the commission and the commission shall issue a written decision regarding the adequacy of the existing and planned transmission facilities in this state to meet the present and future energy needs of this state in a reliable manner.

40-360.03. Applications prior to construction of facilities

Every utility planning to construct a plant, transmission line or both in this state shall first file w ith the commission an application for a certificate of environmental compatibility. The application shall be in a form prescribed by the commission and shall be accompanied by information with respect to the proposed type of facilities and description of the site, including the areas of jurisdiction affected and the estimated cost of the proposed facilities and site. Also the application shall be accompanied by a receipt evidencing payment of the appropriate fee required by section 40-360.09. The application and accompanying information shall be promptly referred by the commission to the chairman of the committee for the committee's review and decision.

40-360.04. Hearings; procedures

A. The chairman of the committee shall, within ten days after receiving an application, provide public notice as to the time and place of a hearing on the application and provide notice by certified mail to the affected areas of jurisdiction at least twenty days prior to a scheduled hearing. If the committee subsequently proposes to condition the certificate on the use of a site other than the site or alternative sites generally described in the notice and considered at the hearing, a further hearing shall be held thereon after public notice. The hearing or hearings shall be held not less than thirty days nor more than sixty days after the date notice is first given and shall be held in the general area within which the proposed plant or transmission line is to be located or at the state capitol at Phoenix as determined by the chairman, at his discretion.

B. The committee may conduct the hearing or may appoint an attorney as a hearing officer. To be eligible for appointment the attorney must reside in a county other than the county in which the proposed site is located and have been admitted to practice in this state for not less than five years.

C. The committee or hearing officer shall receive under oath and before a court reporter the material, nonrepetitive evidence and comments of the parties to the proceedings and any rebuttal evidence of the applicant, and the committee or hearing officer may require the consolidation of the representation of nongovernmental parties having similar interests.

D. The committee shall review and consider the transcript of the public hearing or hearings and shall by a decision of a majority of the members issue or deny a certificate of environmental compatibility within one hundred eighty days after the application has been filed with or referred to the committee.

E. Should the estimated cost of the facilities or site be increased as a result of the action of the committee, such increase, as determined by an independent engineering firm selected jointly by the committee and applicant, shall be reflected in the certificate issued by the committee. The engineering firm shall include a registered professional engineer experienced in utility construction.

40-360.05. Parties to certification proceedings

A. The parties to a certification proceeding shall include:

1. The applicant.

2. Each county and municipal government and state agency interested in the proposed site that has filed with the chairman of the committee, not less than ten days before the date set for the hearing, a notice of intent to be a party.

3. Any domestic nonprofit corporation or association formed in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values, to preserve historical sites, to promote consumer interests, to represent commercial and industrial groups, or to promote the orderly development of the areas in which the facilities are to be located, that has filed with the chairman of the committee, not less than ten days before the date set for the hearing, a notice of intent to be a party.

4. Such other persons as the committee or hearing officer may at any time deem appropriate.

B. Any person may make a limited appearance in the proceeding by filing a statement in writing with the chairman of the committee not less than five days before the date set for the hearing. A statement filed by a person making a limited appearance shall become part of the record. A person making a limited appearance shall not be a party or have the right to present oral testimony or cross-examine witnesses.

C. Any person may make an appearance in the proceeding on behalf of county, municipal government or state agency notwithstanding the fact that the county, municipality or state agency may be represented on the committee as provided for in section 40-360.01.

40-360.10. Expenditure of funds

The commission, upon receipt of a detailed accounting of the committee's expenses, shall approve and pay the following:

1. The cost of reporting and transcribing any application hearing, the compensation of the hearing officer at the rate of two hundred dollars for each day and his reimbursable expenses.
2. Actual and necessary expenses incurred by the committee members in connection with their participation in committee meetings.
3. The cost of studies and the fees of consultants utilized by the committee. Costs and fees exceeding the amount of the applicant's fee may with the applicant's consent be incurred by the committee and charged to the applicant.
4. A refund to the person who paid the filing fee of any unused portion thereof.

40-360.06. Factors to be considered in issuing a certificate of environmental compatibility

A. The committee may approve or deny an application and may impose reasonable conditions upon the issuance of a certificate of environmental compatibility and in so doing shall consider the following factors as a basis for its action with respect to the suitability of either plant or transmission line siting plans:

1. Existing plans of the state, local government and private entities for other developments at or in the vicinity of the proposed site.
2. Fish, wildlife and plant life and associated forms of life upon which they are dependent.
3. Noise emission levels and interference with communication signals.
4. The proposed availability of the site to the public for recreational purposes, consistent with safety considerations and regulations.
5. Existing scenic areas, historic sites and structures or archaeological sites at or in the vicinity of the proposed site.
6. The total environment of the area.
7. The technical practicability of achieving a proposed objective and the previous experience with equipment and methods available for achieving a proposed objective.
8. The estimated cost of the facilities and site as proposed by the applicant and the estimated cost of the facilities and site as recommended by the committee, recognizing that any significant increase in costs represents a potential increase in the cost of electric energy to the customers or the applicant.
9. Any additional factors which require consideration under applicable federal and state laws pertaining to any such site.

B. The committee shall give special consideration to the protection of areas unique because of biological wealth or because they are habitats for rare and endangered species.

C. Notwithstanding any other provision of this article, the committee shall require in all certificates for facilities that the applicant comply with all applicable nuclear radiation standards and air and water pollution control standards and regulations, but shall not require compliance with performance standards other than those established by the agency having primary jurisdiction over a particular pollution source.

D. Any certificate granted by the committee shall be conditioned on compliance by the applicant with all applicable ordinances, master plans and regulations of the state, a county or an incorporated city or town, except that the committee may grant a certificate notwithstanding any such ordinance, master plan or regulation, exclusive of franchises, if the committee finds as a fact that compliance with such ordinance, master plan or regulation is unreasonably restrictive and compliance therewith is not feasible in view of technology available. When it becomes apparent to the chairman of the committee or to the hearing officer that an issue exists with respect to whether such an ordinance, master plan or regulation is unreasonably restrictive and compliance therewith is not feasible in view of technology available, he shall promptly serve notice of such fact by certified mail upon the chief executive officer of the area of jurisdiction affected and, notwithstanding any provision of this article to the contrary, shall make such area of jurisdiction a party to the proceedings upon its request and shall give it an opportunity to respond on such issue.

40-360.07. Compliance by utility; commission order

A. No utility may construct a plant or transmission line within this state until it has received a certificate of environmental compatibility from the committee with respect to the proposed site, affirmed and approved by an order of the commission which shall be issued not less than thirty days nor more than sixty days after the certificate is issued by the committee, except that within fifteen days after the committee has rendered its written decision any party to a certification proceeding may request a review of the committee's decision by the commission.

B. The grounds for review shall be stated in a written notice filed with the commission with a copy thereof served on the chairman of the committee. The committee shall transmit to the commission the complete record, including a certified transcript, and the review shall be conducted on the basis of the record. The commission may, at the request of any party, require written briefs or oral argument and shall within sixty days from the date the notice is filed either confirm, deny or modify any certificate granted by the committee, or in the event the committee refused to grant a certificate, the commission may issue a certificate to the applicant. In arriving at its decision, the commission shall comply with the provisions of section 40-360.06 and shall balance, in the broad public interest, the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of this state.

C. The committee or any party to a decision by the commission pursuant to subsection B of this section may request the commission to reconsider its decision within thirty days after the decision is issued. A request for reconsideration made pursuant to this subsection shall set forth the grounds upon which it is based and state the manner in which the party believes the commission unreasonably or unlawfully applied or failed to apply the criteria set forth in section 40-360.06. The decision of the commission is final with respect to all issues, subject only to judicial review as provided by law in the event of an appeal by a person having a legal right or interest that will be injuriously affected by the decision.

40-360.08. Transfer of certificate; compliance by committee; commission and review panel; authorization to construct

A. Subject to such limitations and conditions as may otherwise be prescribed by law, a certificate may be transferred to any electric company or electric utility agreeing to comply with the terms, limitations and conditions contained therein.

B. If the committee or the commission fails to act on an application within the applicable time period prescribed in this article, the applicant may, in its discretion and in the interest of providing adequate, reliable and economical electric service to its customers, immediately proceed with the construction of the planned facilities at the proposed site or, if application has been made for alternative sites, at the proposed site which in the opinion of the applicant best satisfies the factors expressed in section 40-360.06.

40-360.09. Filing fees; utility siting fund

The fee to be paid for each application is as follows and shall be paid to the committee for deposit, pursuant to sections 35-146 and 35-147, in a special fund to be known as the utility siting fund:

1. For a new proposed plant site and associated transmission line site, ten thousand dollars.
2. For expansion of an existing plant site and a new proposed transmission line site, seven thousand five hundred dollars.
3. For expansion of an existing plant site only, five thousand dollars.
4. For a new proposed transmission line site one hundred miles or more in length, five thousand dollars.
5. For a new proposed transmission line site over fifty but less than one hundred miles in length, two thousand five hundred dollars.
6. For a new proposed transmission line site fifty miles or less in length, one thousand dollars.
7. For a new proposed transmission line site paralleling an existing transmission line site, regardless of length, one thousand dollars.

40-360.10. Expenditure of funds

The commission, upon receipt of a detailed accounting of the committee's expenses, shall approve and pay the following:

1. The cost of reporting and transcribing any application hearing, the compensation of the hearing officer at the rate of two hundred dollars for each day and his reimbursable expenses.
2. Actual and necessary expenses incurred by the committee members in connection with their participation in committee meetings.
3. The cost of studies and the fees of consultants utilized by the committee. Costs and fees exceeding the amount of the applicant's fee may with the applicant's consent be incurred by the committee and charged to the applicant.
4. A refund to the person who paid the filing fee of any unused portion thereof.

40-360.11. Jurisdiction of courts

Subject to the rights to judicial review recognized in sections 40-254 and 40-360.07, no court in this state has jurisdiction to hear or determine any case or controversy concerning any matter which was or could have been determined in a proceeding before the committee or the commission under this article or to stop or delay the construction or operation of any facility, except to enforce compliance through the procedures established by article 3 of this chapter.

40-360.12. Jurisdiction of the commission

Except as specifically provided for in this article nothing in this article shall confer upon the commission the power or jurisdiction to regulate or supervise any person, that is not otherwise a public service corporation regulated and supervised by the commission. Nothing contained in this article shall confer upon the commission the power or jurisdiction to regulate or establish the rates, regulations or conditions of service of any such person.

40-360.13. Certificate of environmental compatability; availability of groundwater and impact on groundwater management plan

For facilities subject to the requirements of this article within the service area of a city or town in an active management area, as such terms are used and defined in title 45, chapter 2, the power plant and transmission line siting committee shall consider, as a criterion for issuing a certificate of environmental compatibility, the availability of groundwater and the impact of the proposed use of groundwater on the management plan established under title 45, chapter 2, article 9 for the active management area.

Attachment 4

health and safety and that a rehearing or review of the decision is impracticable, unnecessary or contrary to the public interest, the decision may be issued as a final decision without an opportunity for a rehearing or review. If a decision is issued as a final decision without an opportunity for rehearing, any application for judicial review of the decision shall be made within the time limits permitted for applications for judicial review of the Commission's final decision.

Historical Note
Former Section R14-3-112 repealed effective December 17, 1975 (Supp. 75-2). New Section R14-3-112 adopted effective March 13, 1979 (Supp. 79-2).

R14-3-113. Unauthorized communications

A. Purpose. It is the purpose of this rule to assist the members of the Arizona Corporation Commission and its employees in avoiding the possibility of prejudice, real or apparent, to the public interest in proceedings before the Commission and hearings before the Arizona Power Plant and Transmission Line Siting Committee.

B. Application. The provisions of this rule apply from the time a contested matter is set for public hearing before the Commission and from the time a notice of siting hearing is published pursuant to R14-3-208(A). The provisions of this rule do not apply to rulemaking proceedings.

C. Prohibitions.
1. No person shall make or cause to be made an oral or written communication, not on the public record, concerning the substantive merits of a contested proceeding or siting hearing to a commissioner or commission employee involved in the decision-making process for that proceeding or siting hearing.
2. No commissioner or commission employee involved in the decision-making process of a contested proceeding or siting hearing shall request, entertain, or consider an unauthorized communication concerning the merits of the proceeding or siting hearing.
3. The provisions of this rule shall not prohibit:
   a. Communications regarding procedural matters;
   b. Communications regarding any other proceedings;
   c. Intra-agency or non-party communications regarding purely technical and legal matters;
   d. Comments from the general public;
   e. Communications among hearing officers, non-party staff and commissioners.

D. Remedy.
1. A commissioner or commission employee who receives an oral or written offer of any communication prohibited by this rule must decline to receive such communication and will explain that the matter is pending for determination and that all communication regarding it must be made on the public record. If unsuccessful in preventing such communications, the recipient will advise the communicator that the communication will not be considered, a brief signed statement setting forth the substance of the communication and the circumstances under which it was made, will be prepared, and the statement will be filed in the public record of the case or proceeding.
2. Any person affected by an unauthorized communication will have an opportunity to rebut on the record any facts or contentions contained in the communication.
3. If a party to a contested proceeding or siting hearing makes an unauthorized communication, the party may be required to show cause why its claim or interest in the proceeding or siting hearing should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

Historical Note
Adopted effective January 3, 1986 (Supp. 86-1). Amended by final rulemaking at 12 A.A.R. 4181, effective December 25, 2006 (Supp. 06-4).

ARTICLE 2. RULES OF PRACTICE AND PROCEDURE BEFORE POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE

R14-3-201. Sessions of the committee

A. Sessions of the Committee shall be held at such times and places as the business of the Committee shall require and after notice as provided in these Rules of Practice and Procedure.

B. Hearings on applications for certificates of environmental compatibility, in the discretion of the chairman but subject to overruling by a majority of the Committee within five days of notice of his decision, shall be conducted by the Full Committee or by a hearing officer qualified under A.R.S. § 40-360.04(B). There shall be no quorum requirement in the event a hearing is conducted by the full Committee.

C. Hearings shall be presided over by a Presiding Officer who shall be either:
1. The chairman or his designee, in the event of a hearing conducted by the full Committee, or
2. The hearing officer.

D. For purposes of these rules, the chairman or his designee shall act as Presiding Officer with respect to each application unless and until a hearing officer is designated in accordance with subsection (B) hereof.

E. The powers and duties of the Presiding Officer, in addition to those set forth in these Rules of Practice and Procedure, shall include the authority to:
1. Administer oaths and affirmations.
2. Rule upon offers of proof and receive relevant evidence.
3. Take or cause depositions to be taken.
4. Regulate the course of a hearing.
5. Hold conferences, prior to the hearings at which time each party shall set forth the issues it wishes to present at the hearing, and during the hearing for the settlement of the issues, and for such other purposes as the Presiding Officer deems appropriate.
6. Dispose of procedural requests or similar matters.
7. Examine witnesses.
8. Set the dates for the submission of transcript corrections.
9. Mail to each member of the Committee, within five days after the transcript is prepared and delivered, a certified copy of the record of the hearings, including the transcript and reproducible exhibits.

Effective 2-70.

Historical Note
Former General Order U-51, Article I.

R14-3-202. Parties

A. Parties to the proceedings before the Committee shall be designated "applicants" or "intervenors".
1. Any person seeking a certificate shall be designated "applicant".
2. Any other person having an interest in a proceeding before the Committee shall be designated "intervenor".

B. The Presiding Officer by notice prior to or during the hearing may require the consolidation of the representation of nongovernmental parties having similar interests.

Effective 2-70.

B. If the Presiding Officer determines an applicant's amendment of an application or accompanying information constitutes a substantial deviation from the public notice given pursuant to R14-3-208(A), within three days of his decision to allow amendment he shall notify the members of the Committee, and subject to being overruled by a majority of the Committee within ten days of notice of his decision, further hearings shall be held thereon after public notice, as provided in R14-3-208(A), in which event the 180-day period specified in R14-3-213(A) shall be deemed to run from the date of such public notice.
Effective 2-70.

Historical Note
Former General Order U-51, Article VII.

R14-3-208. Hearings

A. The Presiding Officer shall, within ten days after receiving an application, provide:
1. Public notice as to the time and place of a hearing on the application.
2. Notice by certified mail to the affected areas of jurisdiction at least ten days prior to the date they are to respond by requesting to become a party.
3. Notice to members of the Committee as provided in R14-3-205(D).

B. Hearings shall be held not less than 30 or more than 60 days after the date notice is first given and shall be held at the discretion of the Presiding Officer:
1. In the general area within which the proposed plant or transmission line is to be located; or
2. At the State Capitol at Phoenix.

C. "Public notice", as used herein, shall mean two publications in a daily or weekly newspaper of general circulation within the general area in which the proposed plant or transmission line is proposed to be located. Such notice shall contain a general description of the substance and purpose of such hearing. If a transmission line is proposed to be located in more than one county, publication shall be made in each county wherein the line is proposed to be located.

D. The Presiding Officer shall receive under oath and before a court reporter the material, nonrepetitive evidence, and comments of the parties to the proceedings and any rebuttal evidence of the applicant.

E. At hearings upon application for a certificate, the applicant shall open and close. The order of presentation herein prescribed shall be followed except as the Presiding Officer may otherwise prescribe. At hearings of several proceedings upon a consolidation, the Presiding Officer shall designate the procedure to be followed. Intervenors shall follow the applicant in whose behalf or in opposition to whom the intervention is made.

F. Individual parties may appear at the hearing on their own behalf. All other persons who are parties shall appear only by a licensed attorney.

G. If the Committee, subsequent to the hearing, proposes to condition issuance of the certificate on the use of a site other than the site or alternate sites generally described in the notice referred to in R14-3-207(A), a further hearing shall be held thereon after public notice, as provided in R14-3-213(A), shall be deemed to run from the date of such public notice.
Effective 2-70.

Historical Note
Former General Order U-51, Article VIII.

R14-3-209. Extensions of time

For good cause shown, continuances and extensions of time will be granted in the discretion of the Presiding Officer, provided however, that when such continuance or extension is provided to an applicant, the running of the 180-day period specified in R14-3-213(A) shall be deemed to be tolled and shall cease to run during such continuance or extension. No such continuance or extension shall be granted to an applicant until such applicant has waived its right to "immediately proceed with construction of the planned facilities" as provided in A.R.S. § 40-360.08(B) for a period of time equal to the applicable time period under these regulations; plus such continuance or extension.
Effective 2-70.

Historical Note
Former General Order U-51, Article IX.

R14-3-210. Witnesses and subpoenas

A. Subpoenas requiring the attendance of witnesses from any place in the state of Arizona at any designated place of hearing may be issued by the Executive Secretary of the Corporation Commission.

B. Subpoenas for the productions of books, papers or documents shall be issued by the Executive Secretary only upon application in writing. Applications to compel witnesses who are not parties to the proceedings, or agents of such parties, to produce documentary evidence must specify, as nearly as may be practicable, the books, papers, or documents desired. Applications to compel a party to the proceedings to produce books, papers or documents should set forth the books, papers or documents sought, with a statement as to the reasons they will be of service in the determination of the proceeding.

C. Witnesses who are summoned are entitled to the same fees as are paid for like service in the courts of the state of Arizona, such fees to be paid by the party at whose instance the witness is called or subpoenaed.

D. If service of subpoena is made by an officer of the state or his deputy, such service shall be evidenced by his return thereon. In case of failure to make service, the reasons for the failure shall be stated on the original subpoena. In making service the original subpoena shall be exhibited to the person served, shall be read to him if he is unable to read, and a copy thereof shall be left with him. The original subpoena, bearing or accompanied by the required return, shall be returned forthwith to the Presiding Officer.
Effective 2-70.

Historical Note
Former General Order U-51, Article X.

R14-3-211. Documentary evidence

A. When relevant and material matter offered in evidence by any party is embraced in a book, papers, or document containing other matter, not material or relevant, the party must plainly designate the matter so offered. If the other matter is in such volume as would unnecessarily encumber the record, such book, paper or document will not be received in evidence but may be marked for identification and, if properly authenticated, the relevant and material matter may be read into the record, or if the Presiding Officer so directs, a true copy of such matter shall be received as an exhibit, and like copies delivered by the party offering the same to opposing parties or their attorneys or agents appearing at the hearing, who shall be afforded opportunity to examine the book, papers or document, and to offer in evidence in like manner other portions thereof, if found to be material and relevant.

B. In case any matter contained in a report or other document on file with the Committee or the Commission is offered in evi-

R14-3-217. Office and address

A. Applications and other papers required to be filed with the Corporation Commission may be transmitted by mail or express, or otherwise delivered but must be received for filing at its office in Phoenix, Arizona, within the time limit, if any, for such filing.

B. Papers required to be filed with the Committee may be transmitted by mail or express, or otherwise delivered but must be received for filing at the Arizona Corporation Commission, Utilities Division, 1688 West Adams, Phoenix, Arizona 85007, within the time limit, if any, for such filing.

Effective 2-70.

Historical Note
Former General Order U-51, Article XVII.

R14-3-218. Filing fees

A. The fees to be paid pursuant to A.R.S. § 40-360.09, for each application, shall be made payable to the Utility Siting Fund and delivered to the chairman of the Commission on behalf of the Committee at Phoenix, Arizona.

B. A receipt evidencing payment of the appropriate fee shall be issued immediately in order to permit the applicant to comply with A.R.S. § 40-360.03.

Effective 2-70.

Historical Note
Former General Order U-51, Article XVIII.

R14-3-219. Form of application for certificate of environmental compatibility (pursuant to A.R.S. §§ 40-360.03 and 40-360.06)

Applications for certificates of environmental compatibility shall be typed or printed on 8 1/2 x 11 paper and shall contain the following information, including information required as exhibits, in the sequence provided:

1. Name and address of the applicant, or in the case of a joint project, the applicants.
2. Name, address and telephone number of a representative of an applicant who has access to technical knowledge and background information concerning the application in question and who will be available to answer questions or furnish additional information.
3. State each date on which applicant has filed a ten-year plan in compliance with A.R.S. § 40-360.02 and designate each such filing in which the facilities for which this application is made were described. If they have not been previously described in a ten-year plan, state the reasons therefore.
4. Description of the proposed facility, including:
   a. With respect to an electric generating plant:
      i. Type of generating facilities (nuclear, hydro, fossil-fueled, etc.).
      ii. Number and size of proposed units.
      iii. The source and type of fuel to be utilized, including a proximate analysis of fossil fuels.
      iv. Amount of fuel to be utilized daily, monthly and yearly.
      v. Type of cooling to be utilized and source of any water to be utilized.
      vi. Proposed height of stacks and number of stacks, if any.
      vii. Dates for scheduled start-up and firm operation of each unit and date construction must commence in order to meet schedules.
      viii. To the extent available, the estimated costs of the proposed facilities and site, stated separately. (If application contains alternative sites, furnish an estimate for each site and a brief description of the reasons for any variations in estimates.)
      ix. Legal description of proposed site. (If application contains alternative sites, list sites in order of applicant's preference with a summary of reasons for such order of preference and any changes such alternative sites would require in the plans reflected in (i) through (viii) hereof.)
   b. With respect to a proposed transmission line:
      i. Nominal voltage for which the line is designed; description of the proposed structures and switchyards or substations associated therewith; and purpose for constructing said transmission line.
      ii. Description of geographical points between which the transmission line will run, the straight-line distance between such points and the length of the transmission line for each alternative route for which application is made.
      iii. Nominal width of right-of-way required, nominal length of spans, maximum height of supporting structures and minimum height of conductor above ground.
      iv. To the extent available, the estimated costs of proposed transmission line and route, stated separately. (If application contains alternative routes, furnish an estimate for each route and a brief description of the reasons for any variations in such estimates.)
      v. Description of proposed route and switchyard locations. (If application contains alternative routes, list routes in order of applicant's preference with a summary of reasons for such order of preference and any changes such alternative routes would require in the plans reflected in (i) through (iv) hereof.)
      vi. For each alternative route for which application is made, list the ownership percentages of land traversed by the entire route (federal, state, Indian, private, etc.).
5. List the areas of jurisdiction [as defined in A.R.S. § 40-360(1)] affected by each alternative site or route and designate those proposed sites or routes, if any, which are contrary to the zoning ordinances or master plans of any of such areas of jurisdiction.
6. Describe any environmental studies applicant has performed or caused to be performed in connection with this application or intends to perform or cause to be performed in such connection, including the contemplated date of completion.

Name of each Applicant
Signature of Authorized Representative of each Applicant

Certificate of Delivery to Arizona Corporation Commission stating the date of such delivery.

Historical Note
Former General Order U-51, Article XIX.

R14-3-220. Unauthorized communications

A. Purpose. It is the purpose of this rule to assist members of the Arizona Power Plant and Line Siting Committee in avoiding

the possibility of prejudice, real or apparent, to the public interest in proceedings before the Siting Committee.

B. Application. The provisions of this rule apply from the time a notice of siting hearing is published pursuant to R14-3-208(A).

C. Prohibitions.

1. No person shall make or cause to be made an oral or written communication, not on the public record, concerning the substantive merits of siting hearing to member of the Siting Committee involved in the decision-making process for that siting hearing.
2. No member of the Siting Committee shall request, entertain, or consider an unauthorized communication concerning the merits of a siting hearing.
3. The provisions of this rule shall not prohibit:
   a. Communications regarding procedural matters;
   b. Communications regarding any other proceedings;
   c. Intra-agency or non-party communications regarding purely technical and legal matters.

D. Remedy.

1. A member of the Siting Committee who receives an oral or written offer of any communication prohibited by this rule must decline to receive such communication and will explain that the hearing is pending for determination and that all communication regarding it must be made on the public record. If unsuccessful in preventing such communications, the recipient will advise the communicator that the communication will not be considered, a brief signed statement setting forth the substance of the communication and the circumstances under which it was made, will be prepared, and the statement will be filed in the public record of the siting hearing.
2. Any person affected by an unauthorized communication will have an opportunity to rebut on the record any facts or contentions contained in the communication.
3. If a party to a contested siting hearing makes an unauthorized communication, the party may be required to show cause why its claim or interest in the siting hearing should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

Historical Note

New Section made by final rulemaking at 12 A.A.R. 4181, effective December 25, 2006 (Supp. 06-4).

Exhibit 1. Exhibits to Application

EXHIBITS TO APPLICATION*

Exhibit A:

1. Where commercially available,** a topographic map, 1:250,000 scale, showing the proposed plant site and the adjacent area within 20 miles thereof. If application is made for alternative plant sites, all sites may be shown on the same map, if practicable, designated by applicant's order of preference.
2. Where commercially available,** a topographic map, 1:62,500 scale, or each proposed plant site, showing the area within two miles thereof. The general land use plan within this area shall be shown on the map, which shall also show the areas of jurisdiction affected and any boundaries between such areas of jurisdiction. If the general land use plan is uniform throughout the area depicted, it may be described in the legend in lieu of an overlay.
3. Where commercially available,** a topographic map, 1:250,000 scale, showing any proposed transmission line route of more than 50 miles in length and the adjacent area. For routes of less than 50 miles in length, use a scale of 1:62,500. If application is made for alternative transmission line routes, all routes may be shown on the same map, if practicable, designated by applicant's order of preference.
4. Where commercially available,** a topographic map, 1:62,500 scale, of each proposed transmission line route of more than 50 miles in length showing that portion of the route within two miles of any subdivided area. The general land use plan within the area shall be shown on a 1:62,500 map required for Exhibit A-3, and for the map required by this Exhibit A-4, which shall also show the areas of jurisdiction affected and any boundaries between such areas of jurisdiction. If the general land use plan is uniform throughout the area depicted, it may be described in the legend in lieu of on an overlay.

---

* Duplication of information shall be avoided in the application and exhibits through the use of cross-references.

** If a topographic map is not commercially available, a map of similar scale, which reflects prominent or important physical features of the area in the vicinity of the proposed site or route shall be substituted.

Exhibit B:

Attach any environmental studies which applicant has made or obtained in connection with the proposed site(s) or route(s). If an environmental report has been prepared for any federal agency or if a federal agency has prepared an environmental statement pursuant to Section 102 of the National Environmental Policy Act, a copy shall be included as a part of this exhibit.

Exhibit C:

Describe any areas in the vicinity of the proposed site or route which are unique because of biological wealth or because they are habitats for rare and endangered species. Describe the biological wealth or species involved and state the effects, if any, the proposed facilities will have thereon.

Exhibit D:

List the fish, wildlife, plant life and associated forms of life in the vicinity of the proposed site or route and describe the effects, if any, the proposed facilities will have thereon.

Exhibit E:

Describe any existing scenic areas, historic sites and structures or archaeological sites in the vicinity of the proposed facilities and state the effects, if any, the proposed facilities will have thereon.

Exhibit F:

State the extent, if any, the proposed site or route will be available to the public for recreational purposes, consistent with safety considerations and regulations and attach any plans the applicant may have concerning the development of the recreational aspects of the proposed site or route.

Exhibit G:

Attach any artist's or architect's conception of the proposed plant or transmission line structures and switchyards, which applicant believes may be informative to the Committee.

Exhibit H:

To the extent applicant is able to determine, state the existing plans of the state, local government and private entities for other developments at or in the vicinity of the proposed site or route.

Exhibit I:

Describe the anticipated noise emission levels and any interference with communication signals which will emanate from the proposed facilities.

Exhibit J:

Describe any special factors not previously covered herein, which applicant believes to be relevant to an informed decision on its application.

Effective 2-70.

Historical Note

Former General Order U-51, Article XIX.

Attachment 5

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

IN THE MATTER OF THE APPLICATION OF TOLTEC, L.L.C. IN CONFORMANCE WITH THE REQUIREMENTS OF ARIZONA REVISED STATUTES 40-360.03 AND 40-360.06, FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AUTHORIZING THE CONSTRUCTION OF A 2,000 MEGAWATT NATURAL GAS-FIRED, COMBINED CYCLE POWER PLANT, SWITCHYARD, AND RELATED FACILITIES IN PINAL COUNTY, ARIZONA. THE PROPOSED FACILITIES ARE LOCATED IN SECTION 26, TOWNSHIP 9 SOUTH, RANGE 7 EAST, GILA AND SALTRIVER BASE AND MERIDIAN,	*Case No. 112* Docket No. L-00000Y-01-0112 DECISION NO. 64446

Arizona Corporation Commission ("Commission") has conducted its review, as prescribed by A.R.S. § 40-360.07. Pursuant to A.R.S. § 40-360.07(B), the Commission, in compliance with A.R.S. § 40-360.06 and in balancing the broad public interest, the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of this state:

The Commission finds and concludes that in a balancing of the broad public interest under A.R.S. §40-360.07(B) in this matter:

1. the record reflects that sufficient need is not established for the proposed power plant and related facilities to be constructed at the proposed site in Pinal County, Arizona;
2. the record compels balancing the competing public interests in favor of protection of the environment and ecology of the State of Arizona by denying Applicant a Certificate of Environmental Compatibility ("CEC"); and
3. the CEC issued by the Arizona Power Plant and Transmission Line Siting Committee

("Committee") should not be confirmed and approved by the Commission.

Therefore, the Commission further finds and concludes that the CEC issued by the Committee is hereby denied by this Order.

DENIED BY ORDER OF THE

ARIZONA CORPORATION COMMISSION

CHAIRMAN COMMISSIONER COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto, set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 6TH day of FEBRUARY, 2002.

BRIAN C. McNEIL
Executive Secretary

DISSENT: _____

RECEIVED

2001 DEC -6 A 2:15

AZ CORP COMMISSION
DOCUMENT CONTROL

BEFORE THE ARIZONA POWER PLANT

AND TRANSMISSION LINE SITING COMMITTEE

IN THE MATTER OF THE APPLICATION OF TOLTEC POWER STATION, L.L.C. IN CONFORMANCE WITH THE REQUIREMENTS OF ARIZONA REVISED STATUTES §§ 40-360.03 AND 40-360.06, FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AUTHORIZING CONSTRUCTION OF A 2,000 MEGAWATT NATURAL GAS-FIRED COMBINED CYCLE POWER PLANT, SWITCHYARD AND RELATED FACILITIES IN PINAL COUNTY, ARIZONA. THE PROPOSED FACILITIES ARE LOCATED IN SECTION 26, TOWNSHIP 9 SOUTH, RANGE 7 EAST, GILA AND SALT RIVER BASE AND MERIDIAN.

CASE NO: 112

DOCKET NO: L-00000Y-01-0112

NOTICE OF FILING DECISION AND ORDER

The Arizona Power Plant and Transmission Line Siting Committee hereby gives notice of filing its decision and order, approving the application of Toltec Power Station, L.L.C., for a Certificate of Environmental Compatibility.

The Decision and Order are in the form attached hereto.

Dated this 6 day of December, 2001.

ARIZONA POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE

By: Laurie A Woodall
Laurie A. Woodall, Esq.
Chairman

Pursuant to A.A.C. R14-3-204, the Original and twenty-five copies were filed this 6 day of December, 2001, with:

Arizona Corporation Commission
Docket Control
1200 West Washington
Phoenix AZ 85007

DECISION NO. 64446

COPIES of the foregoing
mailed/hand-delivered/faxed this
6 day of December, 2001, to:

Lawrence V. Robertson, Jr., Esq.
MUNGER CHADWICK PLC
National Bank Plaza, Suite 300
333 North Wilmot
Tucson AZ 85711

Devinti M. Williams, Esq.
Teena Wolfe, Esq.
Legal Division
Arizona Corporation Commission
1200 W. Washington
Phoenix AZ 85007

Robert S. Lynch, Esq.
340 East Palm Lane, Suite 140
Phoenix AZ 85004-4529

Timothy M. Hogan, Esq.
Arizona Center for Law in the Public Interest
202 E. McDowell Road, Suite 153
Phoenix AZ 85004

Mary-Louise Pasutti
P.O. Box 1733
Arizona City, AZ 85223

Jon Shumaker
Friends of Ironwood Forest National Monument,
Tucson Audubon Society
P.O. 150
Arizona City, AZ 85223

Myra E. Smith
P.O. Box 536
Marana, AZ 85653

Wayne Bryant, Organizer
United Association of Journeymen and Apprentices
Local 741
2475 East Water Street
Tucson AZ 85719-3455

Arizona Reporting Services
2627 North Third Street, Ste. 3
Phoenix, AZ 85004

218368.1

BEFORE THE ARIZONA POWER PLANT AND

TRANSMISSION LINE SITING COMMITTEE

IN THE MATTER OF THE APPLICATION OF TOLTEC POWER STATION, LLC, IN CONFORMANCE WITH THE REQUIREMENTS OF ARIZONA REVISED STATUTES 40-360.03 AND 40-360.06, FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AUTHORIZING CONSTRUCTION OF A 2,000 MEGAWATT NATURAL GAS-FIRED COMBINED CYCLE POWER PLANT, SWITCHYARD, AND RELATED FACILITIES IN PINAL COUNTY, ARIZONA. THE PROPOSED FACILITIES ARE LOCATED IN SECTION 26, TOWNSHIP 9 SOUTH, RANGE 7 EAST, GILA AND SALT RIVER BASE AND MERIDIAN	DOCKET NO. L-00000Y-01-0112 CASE NO. 112 DECISION NO.: _____

DECISION OF THE ARIZONA POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE AND CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY

Pursuant to notice given, as provided by law, the Arizona Power Plant and Transmission Line Siting Committee ("Committee") held public hearings at the Property Conference Center, 1251 West Gila Bend Highway, Casa Grande, Arizona on May 10-11, 2001, at the Embassy Suites, 1515 North 44th Street, Phoenix, Arizona on July 9, 2001, August 6-7, 2001, September 24-26, 2001 and on November 8-9, 2001, and at the Embassy Suites, 2630 E. Camelback, Phoenix, Arizona on November 27, 2001, in conformance with the requirements of Arizona Revised Statutes § 40-360 *et. seq.*, for the purpose of receiving evidence and deliberating upon the Application, as amended, of Toltec Power Station, L.L.C. and its assigns ("Applicant") for a Certificate of Environmental Compatibility ("Certificate") in the above-captioned case.

The following members and designees of members of the Committee were present for the evidentiary presentation during all or portions of the aforesaid hearings and/or deliberation and vote on the amended Application:

Laurie A. Woodall	Chairman, and Designee for the Arizona Attorney General
Ray Williamson	Designee for Chairman of the Arizona Corporation Commission

Mark McWhirter	Designee for Director of the Energy Office of Arizona Department of Commerce
Richard Tobin	Designee for Director of the Arizona Department of Environmental Quality
Dennis Sundie	Designee for Director of the Arizona Department of Water Resources[1]
Patrick Schiffer	Designee for Director of the Arizona Department of Water Resources[1]
Jeff McGuire	Appointed Member
Mike Palmer	Appointed Member
A. Wayne Smith	Appointed Member
Sandie Smith	Appointed Member
Margaret Trujillo	Appointed Member
Mike Whalen	Appointed Member

The Applicant was represented by Lawrence V. Robertson, Jr. The Arizona Corporation Commission ("Commission") staff was represented by Teena Wolfe, DeVinti Williams and David Ronald. Mary-Louise Pasutti, Jon Shumaker and Myra Smith appeared as individual intervenors. Robert S. Lynch appeared on behalf of the Central Arizona Irrigation and Drainage District, Electrical District No. 4, Pinal County, and Electrical District No. 5, Pinal County. Timothy M. Hogan appeared on behalf of the Arizona Center for Law in the Public Interest.

At the conclusion of the public hearings, after consideration of (i) the amended Application and the evidence presented during the public hearings, (ii) the closing arguments of the parties, and (iii) the legal requirements of Arizona Revised Statutes §§ 40-360 through 40-360.13 and A.A.C. R14-3-213, on November 27, 2001, upon motion duly made and seconded, by an 11-0 vote the Committee voted to grant the Applicant the following Certificate.

Applicant is hereby granted a Certificate to site and construct the following facilities ("Project"):

> A natural gas fired, combined cycle electric generating plant with an operating capability not to exceed a nominal site rating of 1800 megawatts (MW). The facilities shall consist of up to three (3) power

[1] Mr. Sundie served as the indicated designee until September, 2001. Thereafter, Mr. Schiffer succeeded Mr. Sundie in that capacity.

blocks, each rated up to 600 MW nominal. Each power block shall consist of (i) two combustion turbine generators (CTG), (ii) two heat recovery steam generators (HRSG) and (iii) one steam turbine electric generator. The plant design may also incorporate (i) supplementary or duct-firing of the HRSG and (ii) injecting steam into the CTG for a given power block. The duct-firing design would be incorporated in the HRSG's and the steam injection design would be incorporated in the CTG's. The power plant and supporting infrastructure shall be located in Section 26, Township 9 South, Range 7 East, G&SRB&M.

The supporting power plant infrastructure shall include (i) an air pollution control system, (ii) water handling and treatment facilities, (iii) fuel system, (iv) instrumentation and control system, (v) switchyard and electrical interconnection(s), (vi) chemical and petroleum product storage facilities, (vii) vehicular access facilities, (viii) evaporation ponds, and (ix) other site improvements. Each of these infrastructure components is described in some detail in the amended Application.

In connection with the design and construction of Project facilities, Applicant shall use low profile structures, moderate stacks, neutral colors, compatible landscaping and low intensity directed lighting for the power plant. The transmission facilities shall include the use of non-reflective conductors and towers. In addition, Applicant shall use a zero discharge system for cooling water, subject to existing regulatory requirements. Further, Applicant shall operate the evaporation ponds so that any salt residue(s) contained therein shall not cause damage to crops grown on fields adjacent to the Project site.

This Certificate is further granted upon the following conditions.

1. Applicant shall comply with all existing applicable air and water pollution control standards and regulations, and with all existing applicable ordinances, master plans and regulations of the State of Arizona, Pinal County, the United States of America, and any other governmental entities having jurisdiction, including but not limited to the following:

   A. all applicable zoning stipulations and conditions, including but not limited to landscaping and dust control requirements and/or approvals;

   B. all applicable air quality control standards, approvals, permit conditions and requirements of the Pinal County Air Quality Control District and/or other State of Arizona or Federal agencies having jurisdiction, and Applicant shall

install and operate selective catalytic reduction at the level determined by the Pinal County Air Quality Control District;

C. all applicable water use and conservation requirements of the Arizona Department of Water Resources ("ADWR"), Pinal Active Management Area.

D. all applicable water use and discharge requirements of the Arizona Department of Environmental Quality;

E. all applicable noise control standards, and during normal operations the project shall not exceed applicable (i) HUD or EPA residential noise guidelines or (ii) OSHA worker safety noise standards;

F. all applicable regulations and permits governing storage and handling of chemical and petroleum products; and

G. all applicable floodplain occupancy, use and management requirements, standards and conditions prescribed by (i) Pinal County and the Pinal County Floodplain Administrator, and (ii) the Federal Emergency Management Agency.

In connection with approvals of or permits for Project facilities to be issued by Pinal County, Applicant shall attach a copy of this Decision and Certificate to any applications or requests it submits to Pinal County and the City of Eloy.

2. In connection with the engineering, design, construction, operation and maintenance of the Project facilities, Applicant and its consultants and contractors shall apply recognized and accepted geotechnical engineering and civil engineering standards and practices. In addition, Applicant shall implement the Ground Subsidence and Earth Fissure Monitoring Program agreed to between Applicant and the Arizona Department of Water Resources, which was received into evidence as Exhibit No. A-27.

A. In the event of the occurrence of an "alert condition," as defined in the Monitoring Program, Applicant, ADWR, Pinal County and the United States Geological Survey ("USGS") shall confer as to the investigative and/or

mitigation program(s), if any, to be undertaken in response to such "alert condition." In the event Applicant, ADWR, Pinal County and USGS are unable to agree as to the program(s) or course(es) of action to be undertaken, Applicant shall refer the matter to the Commission for a hearing and decision to determine the investigative and/or mitigation programs, if any, to be undertaken in response to such "alert condition."

B. Commencing with the fifth year of commercial operation of the initial power block of the Project, Applicant shall annually contribute One Hundred Thousand Dollars ($100,000) to a Subsidence Mitigation Fund ("Fund") to be established and maintained by Applicant at a national or state-chartered bank. Such contribution obligation shall be suspended whenever the balance in the Fund reaches the principal amount of Five Hundred Thousand Dollars ($500,000). Interest earned on the Fund shall belong to Applicant.

C. Persons claiming property damage as a result of ground subsidence allegedly directly attributable to Project operation may submit a claim for mitigation payment to Applicant. Applicant shall investigate the circumstances surrounding the claim and make a determination, if possible, as to the cause of the claimant's alleged property damage. If it is determined that the damage in question has been caused by Project operations, funds shall be disbursed from the Fund to compensate claimant for the amount of damage determined to be directly attributable to the Project. If the cause or amount of the alleged damage is in dispute, Applicant agrees to submit the matter to binding arbitration with the American Arbitration Association, if the person claiming damage agrees.

D. The Subsidence Mitigation Fund account shall be maintained for three (3) years after the end of the Project's economic life, as determined by Applicant. Once the three (3) year period has passed, the account shall be closed, and any remaining funds shall be disbursed back to Applicant.

3. In anticipation of the impact of the Project upon the demand for local public services, and prior to the commencement of construction, Applicant shall do the following:

A. Donate sufficient funds to the Eloy Fire District ("District") as a capital outlay to enable it to acquire, through purchase or lease, an additional emergency services vehicle, with the manner of acquisition to be determined by the District;

B. Donate $100,000 to the Pinal County Sheriff's ("Sheriff") Office as a capital outlay to be administered for law enforcement services and equipment, as determined by the Sheriff; and

C. Donate to the Eloy Elementary School District and Toltec Elementary School District such additional classrooms and portable classrooms, together with related utilities, in the event the Superintendent(s) of either or both District(s) conclude that formally adopted student/teacher ratios will be exceeded by reason of construction of Project facilities.

4. Applicant shall prepare a plan for shutdown, decommissioning and cleanup of the plant site which shall be filed with the Commission's Docket Control section within one year of beginning construction. In that regard, the Committee recommends that Applicant work with Pinal County and/or any other local governing body with jurisdiction over the plant site to ensure that such plan is reasonable, and is followed or amended as needed.

5. A part of Applicant's cost of the power plant shall be devoted to solar generation.

6. Applicant's plant interconnection must satisfy the Western Systems Coordinating Council's ("WSCC") single contingency outage criteria (N-1) and all applicable local utility planning criteria without reliance on remedial action such as reducing generator output, generator unit tripping or load shedding.

7. Prior to construction of any facilities, Applicant must provide the Commission with technical study evidence that sufficient transmission capacity exists to accommodate the full output of the plant and that the full output of the plant shall not compromise

the reliable operation of the interconnected transmission system. The technical studies shall include a power flow and stability analysis report showing the effect of the plant on the existing Arizona electric transmission system. The technical study report(s) shall document both physical flow capability as well as contractual schedule capability to deliver full plant output to its intended market. In addition, Applicant must provide the Commission with updates to the information required in this condition not more than one year and not less than three months prior to commercial operation of the plant. Prior to commencing operation of a given power block, transmission facilities improvements necessary to deliver the full output of that power block to intended markets, as identified in the aforesaid technical studies, shall have been completed.

8. Applicant shall become and remain a member of the WSCC, or its successor, and file an executed copy of its WSCC Reliability Management System ("RMS") Generator Agreement with the Commission. Membership by an affiliate of Applicant satisfies this condition only if Applicant is bound by the affiliate's WSCC membership.

9. Applicant shall apply to become, and if accepted, thereafter remain a member of the Southwest Reserve Sharing Group or its successor, thereby making its units available for reserve sharing purposes, subject to competitive pricing.

10. Applicant shall continue to participate in good faith in state and regional transmission study forums to identify and encourage expedient implementation of transmission enhancements, including transmission cost participation as appropriate, to reliably deliver power from the Project throughout the WSCC grid in a reliable manner.

11. Applicant shall first offer wholesale power purchase opportunities to credit-worthy Arizona load-serving entities and to credit-worthy marketers providing service to those Arizona load-serving entities.

12. Applicant shall offer for Ancillary Services, in order to comply with WSCC RMS requirements, a total of up to 10% of its total plant capacity to (A) the local Control Area with which it is interconnected and (B) Arizona's regional ancillary service market, (i) once a Regional Transmission Organization (RTO) is declared operational

by FERC order, and (ii) until such time that an RTO is so declared, to a regional reserve sharing pool.

13. Pursuant to applicable Federal Energy Regulatory Commission ("FERC"), regulations, Applicant shall not knowingly withhold its capacity from the market for reasons other than a forced outage or pre-announced planned outage.

14. Within 30 days of the Commission decision authorizing construction of the Project, Applicant shall erect and maintain at the site a sign of not less than 4 feet by 8 feet dimensions, advising:

A. that the site has been approved for the construction of an 1800 megawatt (nominal) generating facility;

B. the expected date of completion of the Project; and

C. phone number for public information regarding the Project.

In the event that Applicant requests an extension of the term of the Certificate prior to completion of the construction, Applicant shall use reasonable means to directly notify all landowners and residents within one-mile radius of the Project of the time and place of the proceeding in which the Commission shall consider such request for extension. Applicant shall also provide notice of such extension to the community of Eloy and Pinal County.

15. Applicant shall pursue all necessary steps to ensure a reliable supply and delivery of natural gas for the generating facility.

16. In connection with the construction of the Project, Applicant shall use commercially reasonable efforts, where feasible, to give due consideration to use of qualified Arizona contractors.

17. Beginning in the second year of commercial operation of the Project's first power block, and subject to its availability and the availability of the delivery facilities of the Central Arizona Project (CAP) and the Central Arizona Irrigation and Drainage District (CAIDD), Applicant shall annually purchase, directly or through CAIDD, water from the Central Arizona Water Conservation District (CAWCD), in an amount

equal to the volume which can then be purchased for One Hundred Thousand Dollars ($100,000) per 600 megawatt power block that becomes operational. Such water shall be delivered to CAIDD annually for use by CAIDD as "in lieu" water in CAIDD's groundwater savings facility. Applicant shall acquire and maintain any necessary water storage permit pursuant to A.R.S. § 45-831.01, as such statute may be amended from time to time, and shall designate such water storage permit as "nonrecoverable" pursuant to A.R.S. § 45-833.01, as such statute may be amended from time to time. If Applicant has used or recharged water acquired from the CAP on the property acquired for the Project, or if the use of groundwater in conjunction with the Project becomes subject to a replenishment obligation, through the Central Arizona Groundwater Replenishment District (CAGRD) or otherwise, the amount of such use, recharge or replenishment shall be treated as a credit against Applicant's obligation under this condition to provide water to CAIDD.

18. Applicant shall participate in workshops to be convened during the year 2002 which shall address both long term and short term gas transportation reliability and capacity issues within the State of Arizona. Applicant shall work with other participants during the years 2002, 2003 and 2004 to develop alternative solutions to these gas pipeline issues.

19. Within five days of Commission approval of this CEC, Applicant shall request in writing that El Paso Natural Gas Company ("El Paso") provide Applicant with a written report describing the operational integrity of El Paso's Southern System facilities through Picacho Basin. Such request shall include:

A. a request for information regarding inspection, replacement and/or repairs performed on this segment of El Paso's pipeline facilities since 1996 and those planned through 2006; and

B. an assessment of subsidence impacts on the integrity of this segment of pipeline over its full cycle, together with any mitigation steps taken to date or planned in the future.

Applicant shall file El Paso's response under this docket with the Commission's Docket Control. Should El Paso not respond within thirty (30) days, Applicant shall docket a copy of Applicant's request with an advisory of El Paso's failure to respond. In either event, Applicant's responsibility hereunder shall terminate once it has filed El Paso's response or Applicant's advisory of El Paso's failure to respond.

20. In conjunction with its construction of the Project facilities, Applicant shall implement the Land Management Plan set forth at Exhibit B-2 to the amended Application which was identified in the record as Exhibit No. A-1, and the Landscape Plan set forth at Exhibit No. A-13. In addition, Applicant shall adhere to and implement, as applicable, the mitigation practices and measures described in (i) the Arizona State Parks, State Historic Preservation Office, August 3, 2001 letter to the Chairman of the Committee relating to Case 113, and received in evidence in that case as Exhibit A-7, and (ii) the United States Department of Interior, Fish and Wildlife Service, July 26, 2001 letter to Applicant's Project Development Manager. Copies of these correspondence are attached as Appendices "A" and "B," respectively, and incorporated herein by reference. In that regard, Applicant shall not remove any native trees that have trunk diameters of six inches or greater at 4½ feet off the ground, or saguaros 8 feet or taller. Finally, should the problem present itself, Applicant shall work with the United States Fish and Wildlife Service and the Arizona Game and Fish Department to develop screening or other methods to protect wildlife from harm at the Project's evaporation ponds.

21. In addition to the $230,000 of research funding provided for in connection with its proposed Land Management Plan set forth in Ex. No. A-1, Exhibit B, page B-2-14 and Table B-2-2, Applicant shall make a donation of $300,000 to the University of Arizona's Department of Arid Land Studies with the objective of assisting and furthering research and programmatic efforts in the study of revegetation of arid southwestern lands similar to those surrounding the Project site. Such donation shall be made by Applicant in equal annual installments of $100,000 for three years,

beginning at the end of the Project's second full year of commercial operation of the first power block.

22. This authorization to site and construct the Project facilities shall expire five (5) years from the date the Certificate is approved by the Commission unless construction is completed and the plant is in operation. If construction on a power block has not begun before expiration of the five-year limit, Applicant shall no longer be authorized to begin construction on such power block. However, before such expiration Applicant may request that the Commission extend this time limitation.

GRANTED this 12 day of December, 2001.

Arizona Power Plant and Transmission Line Siting Committee

By Laurie A. Woodall
Laurie A. Woodall, Chairman

Decision No. _____

APPROVED BY ORDER OF THE ARIZONA CORPORATION COMMISSION

Commissioner Commissioner Commissioner

IN WITNESS WHEREOF, I , Brian C. McNeil, Executive Secretary of the Arizona Corporation Commission set my hand and caused the official seal of this Commission to be affixed, this ____ day of December, 2001.

Brian C. McNeil
Executive Secretary

Dissent: _____

APPENDIX "A"

"Managing and conserving natural, cultural, and recreational resources"

Arizona State Parks

FAXED 8/3/01

In reply, please refer to SHPO-2001-737 (6940) ✓ more information requested

August 3, 2001

Laurie A. Woodall, Chairperson, Power Plant and Transmission Line Siting Committee
Assistant Attorney General, Environmental Enforcement Section
Office of the Attorney General
1275 West Washington
Phoenix, Arizona 85007

RE: Proposed Toltec Transmission Line, near Eloy, Pinal County, Arizona

Dear Ms. Woodall:

Thank you for having the committee's applicant initiate consultation with this office regarding the above-mentioned state plan and associated certificate of environmental compatibility. The proposed plan includes the construction of two transmission lines totaling approximately 32 miles and associated access roads on Arizona State Land Department and private lands. Historian Bill Collins and I have reviewed the documents submitted and offer the following comments pursuant to the State Historic Preservation Act (i.e., A.R.S. § 41-861 to 41-864) and the committee's factors to be considered (i.e., A.R.S. § 40-360.06.A.5).

The cultural resources survey identified ten archaeological sites, five historic-period structures, and 63 isolated artifact and/or feature occurrences (IOs) situated within the geographic area affected by the plan. The sites represent past use of the area by Archaic and Hohokam peoples for habitation and resource procurement or processing; one site (i.e., AZ AA:6:20 ASM) contains a possible ballcourt feature, which is a type of public architecture only present at important Hohokam villages. In addition, a portion of the proposed corridor is located directly adjacent to Los Robles Archaeological District, which is listed on the National Register of Historic Places. The report was professionally prepared; my technical comments are presented on the attached page.

We agree that Sites AZ AA:6:20, 72-74, 76, 77, and 79 (ASM) are eligible for inclusion in the State and National Registers of Historic Places (SNRHP) under Criterion D (Information Potential). We agree that sites AZ AA:6:71, 75 and 78 (ASM) may be eligible for inclusion in the SNRHP under Criterion D (Information Potential), but require archaeological testing; we suggest that they be treated as if they are eligible until proven otherwise. We agree that the Southern Pacific Railroad is eligible for inclusion in the SNRHP under Criteria A (Event) and D (Information Potential). We agree that the eligibility status of El Paso Natural Gas Pipelines 1100 and 1103, Greene Canal, and Sasco Road are unclear at this time; we suggest that they be treated as if they are eligible until proven otherwise. We agree that the 63 IOs are not eligible under any criterion.

We agree in principle that avoidance and preservation-in-place is an appropriate treatment; in fact, the transmission line may help protect historic properties by inhibiting other kinds of development within the proposed corridor. However, the location of the poles and access roads is unknown at this time, and thus it is unclear if avoidance of all eligible

Arizona State Parks
1300 W. Washington
Phoenix, AZ 85007

1 & TTY: 602.542.4174
www.pr.state.az.us

800.285.3703
from (520) area code

General Fax:
602.542.4180

Director's Office Fax:
602.542.4188

properties present is feasible. Avoidance of archaeological sites usually entails the taking positive steps, such as erecting temporary fences and establishing buffer zones, to insure that plan-related, ground-disturbing activities, such as trench excavation and vehicular movement on unpaved roads, do not occur within the external boundaries of sites. Avoidance of historic-period resources generally entails taking precautions to ensure that the characteristics that contribute to property's eligibility are not impacted.

Based on the above, this office cannot assess the plan's effects to the identified historic properties within the corridor, and thus cannot concur with determination of impact at this time. Unless all historic properties can be avoided, a determination of negative impacts is likely.

We offer the following conditions for the committee's consideration:

1) The applicant will continue to consult, on the committee's behalf, with the State Historic Preservation Office (SHPO) to reach a determination of impact. If the result is a determination of negative impact, the applicant will continue to consult with SHPO to resolve the negative impacts.

2) The applicant will assess and resolve the transmission lines visual and other indirect impacts, if any, to the adjacent National Register of Historic Places-listed Los Robles Archaeological District in consultation with SHPO.

3) The applicant will ensure that the Hohokam habitation site known as AZ AA:6:20 (ASM), which contains a possible ballcourt feature, will be avoided by all plan-related, ground-disturbing activities. Based on the survey report description, this site is the largest, and arguably the most important one present within the proposed corridor.

4) If the applicant decides that archaeological Sites AZ AA:6:71-79 (ASM) cannot be avoided, then the applicant will plan and implement an archaeological testing and/or data recovery program in consultation with SHPO.

5) After construction, the applicant, in conjunction with the land-managing agency, if any, will allow Arizona Site Stewards, a volunteer-staffed SHPO program, to periodically inspect the sites present within the corridor for vandalism or damage.

6) In consultation with SHPO and the land-managing agency, the applicant will consider and assess potential direct and indirect impacts to eligible properties related to new access roads or any existing access roads that require blading. An example of an indirect impact would be a road that leads directly to an archaeological site that in effect invites intentional or unintentional vandalism (e.g., looting or off-road vehicle use); in such a case, adding a locked gate or otherwise blocking the road, would be an appropriate treatment.

7) The applicant will follow Arizona State Land Department's instructions, if any, regarding eligible property situated on their land in consultation with SHPO.

In the future, we suggest that the Committee ask its applicants to submit a draft treatment plan along with a cultural resources survey report. The plan should describe how the applicant intends to treat (i.e., avoid, lessen, or mitigate impacts) any historic properties identified within the corridor. This document could be a agreement to avoid certain types of properties, and mitigate (i.e., archaeological data recovery) other types.

We look forward to receiving a revised survey report and apprcciate your cooperation with this office in considering the effects of state plans on cultural resources situated in Arizona. If you have any questions or concerns, please contact me at (602) 542-7137 or electronically via mbilsbarrow@pr.state.az.us.

Sincerely,

Matthew H. Bilsbarrow, RPA
Compliance Specialist/ Archaeologist
State Historic Preservation Office

attachment

cc. w/attachment
Bill Collins, SHPO
Glenn P. Darrington, RPA
Environmental Planning Group
4350 East Camelback Road, Suite G-200
Phoenix, Arizona 85018

General and Technical Comments on "A Cultural Resources Survey of Approximately 1,643 Acres for the Toltec Transmission Line Project, Santa Cruz Flats, Pinal County, Arizona" by Mary Morrison, Kris Dobschuetz, and Glenn Darrington. Environmental Planning Group Cultural Resources Services Technical Paper No. 5.

General Comments

1) Overall the report is professionally prepared and well-written. The photographs and maps were helpful. The recommendation are well-justified.

2) Figures 4 and 5, which are U.S.G.S. topographic maps showing site locations, are quite detailed, and passing them out at a public hearing is, at best, imprudent. As you know, archaeological site locations are confidential pursuant to A.R.S. § 39-125. I suggest limiting the number of report copies containing a complete set of maps and distributing them on a need-to-know-basis. In addition, a prominently placed label indicting the confidential nature of the maps would be prudent.

3) The presence of the Los Robles Archaeological District, which is situated adjacent to the proposed transmission line corridor, is not sufficiently discussed in the results or recommendation sections. In addition, the district, as a distinct entity, in not shown on Figures 4C and 5C. Showing and listing the sites within the district is not necessary on Figure 4 or Table 4; just showing the most important sites within the district and those closest to the project area would have been sufficient. At present, the reader is unnecessarily overwhelmed with too much detail.

4) The cultural history section would be greatly aided by citing Craig Ringer's 1996 booklet titled "Engagement at Picacho Peak," which is published by Arizona State Parks. This resource summarize the accounts of the Arizona's only Civil-War battle.

Technical Comments

1) Five historic-period structure are described in the report, not four; the pipelines are separate properties.

2) Please add modern features, such as roads, that based on the description and the topographic map are present within or adjacent to the sites. For example, a dirt road mentioned within Site AA:6:72 (ASM) is not shown on Figure 6; Figure 13 is a good example that does show modern features.

3) Please add the transmission line boundary to the appropriate site maps. At present it is sometime difficult to determine which part of the site occurs outside the project area.

4) Please be consistent in the line types used for showing site boundaries. Figures 5b and 14 have different site boundary lines from the rest of the sites illustrated in the report, and is confusing.

5) On page 38, what ware does the black-on-white sherd represent, and what is meant by "intermediate?"

6) Please add photographs of the historic-period resources that are visible on the modern ground surface to the report. Such photos are specifically requested in our office's report guidelines (i.e., "SHPO Administrative Procedure for Documentation Submitted for Review in Compliance with Historic Preservation Laws" dated December 1999).

APPENDIX "B"

United States Department of the Interior
U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951
Telephone: (602) 242-0210 FAX: (602) 242-2513

In Reply Refer To:

AESO/SE
2-21-01-I-378

July 26, 2001

Mr. Tom C. Wray
Project Development Manager
Toltec Power Station, LLC
4350 East Camelback, Suite B-175
Phoenix, Arizona 85018

Dear Mr. Wray:

This letter is in response to the June 7, 2001 request for informal consultation, pursuant to section 7 of the Endangered Species Act (16 U.S.C. 1531-1544), as amended, in regards to the proposed Toltec Power Station, Pinal County, Arizona. Toltec, LLC proposes to construct a combined-cycle, natural gas-fueled power plant on 200 acres in T9S, R7E, Sections 26 and 27.

Linwood Smith is designated the non-federal representative, for the Environmental Protection Agency (EPA) for this project. He requests concurrence from the Fish and Wildlife Service (Service) that the proposed Toltec Power Station may affect, but is not likely to adversely affect, the cactus ferruginous pygmy-owl *(Glaucidum brasilianum cactorum)*.

The proposed project is located approximately 10 miles south of Interstate 10 near the City of Eloy. It involves constructing a combined-cycle, natural gas-fueled power plant. The power station will include four 500-megawatt (MW) units phased in over time, to provide a total capacity of up to 2,000 MW. The generating facilities will cover approximately 200 acres of the property and will include gas and steam generators, transformers, switchyards, a cooling system, exhaust stacks, and evaporation ponds. Construction is anticipated to begin in early 2002. The proposed project site and construction staging area are located on agriculture land at approximately 1,600-foot elevation. The majority of adjacent parcels are also utilized for agriculture.

As part of the proposed action, you will implement the following measures to minimize the effects of the action on listed species: 1) The only areas that will be disturbed for construction of this project are located on land that is currently under cultivation, 2) No constituent habitat components for the cactus ferruginous pygmy-owl will be destroyed or removed, i.e. including trees with trunk diameters of 6 inches or greater at 4 ½ feet off the ground, or saguaros 8 feet or taller.

Cactus Ferruginous Pygmy-Owl

This species was listed on March 10, 1997 (U.S. Fish and Wildlife Service 1997 [62 FR 10730]). The past and present destruction, modification, or curtailment of habitat are the primary reasons for the decrease in population levels of the pygmy-owl. On July 12, 1999, we designated approximately 731,712 acres critical habitat supporting riverine, riparian, and upland vegetation in seven critical habitat units, located in Pima, Cochise, Pinal, and Maricopa counties in Arizona (U.S. Fish and Wildlife Service 1999 [64 FR 37419]).

Pygmy-owls are found in a variety of vegetation communities such as: riparian woodlands, mesquite bosques, Sonoran desertscrub, and semidesert grassland communities, as well as nonnative vegetation within these communities. While plant species composition differs among these communities, there are certain unifying characteristics such as the presence of vegetation in a fairly dense thicket or woodland, the presence of trees or saguaros large enough to support cavity nesting, and elevations below 4,000 ft. The pygmy-owl is non-migratory.

The proposed project is located within Survey Zone 3 for the pygmy-owl. Zone 3 is within the historic range of the pygmy-owl and has a low potential of occupancy. The project area was examined for suitable habitat on site and within 1/4 mile to determine noise impacts during construction. No suitable habitat exists on site or within a 1/4 mile, and therefore, none will be removed during construction.

CONCLUSION

The Service concurs with Mr. Smith's determination that the proposed action may affect, but is not likely to adversely affect the pygmy-owl. We base this determination on the following:

1. No nesting habitat, i.e., trees with a diameter greater than 6 inches, 4 ½ feet above the ground, or saguaros 8 feet or taller, will be removed.

2. The closest known pygmy-owl location is 23 miles from the project site.

No further section 7 consultation is required for this project at this time. Thank you for your consideration of endangered species. Should project plans change, or if additional information on the distribution of listed or proposed species or critical habitat becomes available, the conclusions herein may need to be reconsidered. If we can be of further assistance in this matter, please contact Kim Hartwig (520) 670-4637 or Sherry Barrett (520) 670-4617.

Sincerely,

for David L. Harlow
Field Supervisor

cc: Regional Director, Fish and Wildlife Service, Albuquerque, NM (ARD-ES)
Regional Supervisor, Arizona Game and Fish Department, Tucson, AZ
Environmental Planning Group, Tucson, AZ (Attn: Linwood Smith)
Wind River Environmental Group, Denver, CO (Attn: John M. Clous)
Environmental Planning Group, Phoenix, AZ (Attn: Mickey Siegel)

W:\Kim Hartwig\Tolteccon.wpd:cgg

Attachment 6

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

IN THE MATTER OF THE APPLICATION OF SALT RIVER PROJECT, OR THEIR ASSIGNEE(S), IN CONFORMANCE WITH THE REQUIREMENTS THE ARIZONA REVISED STATUTES 40-360.03 AND 40-360.06 FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AUTHORIZING THE CONSTRUCTION OF NATRUAL GAS-FIRED, COMBINED CYCLE GENERATING FACILITIES AND ASSOCIATED INTRAPLANT TRANSMISSION LINES, SWITCHYARD IN GILBERT, ARIZONA, LOCATED NEAR AND WEST OF THE INTERSECTION OF VAL VISTA AND WARNER ROAD	Case No. 105 Docket No. L-00000B-00-0105 Decision No. 63611

The Arizona Corporation Commission (Commission) has conducted its review, as prescribed by A.R.S. § 40-360.07. Pursuant to A.R.S. § 40.360.07(B), the Commission, in compliance with A.R.S. § 40-360.06, and in balancing the broad public interest, the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of this state;

The Commission finds and concludes that the Certificate of Environmental Compatibility should be granted upon the additional and modified conditions stated herein.

35. The Santan Expansion Project shall be required to meet the Lowest Achievable Emission Rate (LAER) for Carbon Monoxide (CO), Nitrogen Oxides (NO_x), Volatile Organic Carbons (VOCs), and Particulate Matter less than ten micron in aerodynamic diameter (PM_{10}). The Santan Expansion Project shall be required to submit an air quality permit application requesting this LAER to the Maricopa County Environmental Services Department.

36. Due to the plant's location in a non-attainment area, the Applicant shall not use diesel fuel in the operation of any combustion turbine or heat recovery steam generator located at the plant.

37. In obtaining emissions reductions related to Carbon Monoxide (CO) emissions, Applicant shall where technologically feasible obtain those emission reductions onsite to the Santan Expansion Project.

38. Beginning upon commercial operation of the new units, Applicant shall conduct a review of the Santan Generating facility operations and equipment every five years and shall, within 120 days of completing such review, file with the Commission and all parties in this docket, a report listing all improvements which would reduce plant emissions and the costs associated with each potential improvement. Commission Staff shall review the report and issue its findings on the report, which will include an economic feasibility study, to the Commission within 60 days of receipt. Applicant shall install said improvements within 24 months of filing the review with the Commission, absent an order from the Commission directing otherwise.

39. Applicant shall provide $20,000 to the Pipeline Safety Revolving Fund on an annual basis, thus improving the overall safety of pipelines throughout the State of Arizona.

40. Where feasible, Applicant shall strive to incorporate local and in-state contractors in the construction of the three new generation units for the expansion projects.

41. Applicant shall construct a 10 foot high block wall surrounding the perimeter of the Santan plant, and appropriately landscape the area consistent with the surrounding neighborhood, unless otherwise agreed to by the Salt River Project and the Citizens Working Group.

APPROVED AS AMENDED BY ORDER OF THE ARIZONA CORPORATION COMMISSION

Chairman Commissioner Commissioner

IN WITNESS WHEREOF, I, Brian C. McNeil, Executive Secretary of the Arizona Corporation Commission, set my hand and cause the official seal of the Commission to be affixed this 18 day of May, 2001.

By
Brian C. McNeil
Executive Secretary

Dissent: _____

BEFORE THE ARIZONA POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE

In the matter of the Application of Salt River Project Agricultural Improvement and Power District in conformance with the requirements of Arizona Revised Statutes Sections 40-360-03 and 40-360.06, for a Certificate of Environmental Compatibility authorizing the Expansion of its Santan Generating Station, located at the intersection of Warner Road and Val Vista Drive, in Gilbert, Arizona, by adding 825 megawatts of new capacity in the form of three combined cycle natural gas units, and associated intraplant transmission lines.	Case No. 105 Docket No. L-00000B-00-0105 Decision No. 63611

CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY

Pursuant to notice given as provided by law, the Arizona Power Plant and Transmission Line Siting Committee (the "Committee") held public hearings at the Dobson Ranch Inn, 1644 South Dobson Road, Mesa, Arizona, on September 14, 2000, and various days following, in conformance with the requirements of Arizona Revised Statutes section 40-360 *et seq.*, for the purpose of receiving evidence and deliberating on the Application of Salt River Project Agricultural Improvement and Power District ("Applicant") for a Certificate of Environmental Compatibility in the above-captioned case (the "Application").

The following members or designees of members of the Committee were present for the hearing on the Application:

Paul A. Bullis	Chairman, Designee for Arizona Attorney General Janet Napolitano
Steve Olea	Designee of Chairman of the Arizona Corporation Commission

Richard Tobin	Designee for the Arizona Department of Environmental Quality
Dennis Sundie	Designee for the Director of the Department of Water Resources
Mark McWhirter	Designee for the Director of the Energy Office of the Arizona Department of Commerce
George Campbell	Appointed Member
Jeff Mcguire	Appointed Member
A. Wayne Smith	Appointed Member
Sandie Smith	Appointed Member
Mike Whalen	Appointed Member

The Applicant was represented by Kenneth C. Sundlof, Jr., Jennings, Strouss & Salmon PLC. There were seventeen intervenors: Arizona Utilities Investor Association, by Ray Heyman; Arizona Corporation Commission Staff, by Janice Alward; Arizona Center for Law in the Public Interest, by Timothy Hogan, Mark Kwiat, Elisa Warner, David Lundgreen, Cathy LaTona, Sarretta Parrault, Mark Sequeira, Cathy Lopez, Michael Apergis, Marshal Green, Charlie Henson, Jennifer Duffany, Christopher Labban, Bruce Jones and Dale Borger. There were a number of limited appearances.

The Arizona Corporation Commission has considered the grant by the Power Plant and Line Siting Committee of a Certificate of Environmental Compatibility to SRP and finds that the provisions of A.R.S. §40-360.06 have complied with, and, in addition, that documentary evidence was presented regarding the need for the Santan Expansion Project. Credible testimony was presented concerning the local generation deficiency in Arizona and the need to locate additional generation within the East Valley in order to minimize transmission constraints and ensure reliability of the transmission grid. The evidence included a study that assessed the needs of the East Valley. The analysis

found that the East Valley peak load currently exceeds the East Valley import capability and within the next 5 years the East Valley load will exceed the load serving capability.

Additional testimony was presented regarding SRP's projected annual 3.7% load growth in its service territory. By 2008, SRP will need approximately 2700 MW to meet its load. This local generation plant will have power available during peak periods for use by SRP customers.

At the conclusion of the hearing and deliberations, the Committee, having received and considered the Application, the appearance of Applicant and all intervenors, the evidence, testimony and exhibits presented by Applicant and all intervenors, the comments made by persons making limited appearances and the comments of the public, and being advised of the legal requirements of Arizona Revised Statutes Sections 40-360 to 40-360.13, upon motion duly made and seconded, voted to grant Applicant the following Certificate of Environmental Compatibility (Case No. L-00000B-00-0105):

Applicant and its assignees are granted a Certificate of Environmental Compatibility authorizing the construction of an 825 megawatt generating facility consisting of three combined cycle units with a total net output of 825 megawatts together with related infrastructure and appurtenances, in the Town of Gilbert, on Applicant's existing Santan Generating Station site, and related switchyard and transmission connections, as more specifically described in the Application (collectively, the "Project"). Applicant is granted flexibility to construct the units in phases, with different steam turbine configurations, and with different transmission connection configurations, so long as the construction meets the general parameters set forth in the application.

This certificate is granted upon the following conditions:

1. Applicant shall comply with all existing applicable air and water pollution control standards and regulations, and with all existing applicable ordinances, master plans and regulations of the State of Arizona, the Town of Gilbert, the County of Maricopa, the United States, and any other governmental entities having jurisdiction.

2. This authorization to construct the Project will expire five (5) years from the date the Certificate is approved by the Arizona Corporation Commission unless construction of the Project is completed to the point that the project is capable of operating at its rated capacity; provided, however, that Applicant shall have the right to apply to the Arizona Corporation Commission for an extension of this time limitation.

3. Applicant's project has two (2) approved transmission lines emanating from its power plant" transmission switchyard and interconnecting with the existing transmission system. This plant interconnection must satisfy the single contingency criteria (N-1) without reliance on remedial action such as a generator unit tripping or load shedding.

4. Applicant shall use reasonable efforts to remain a member of WSCC, or its successor, and shall file a copy of its WSCC Reliability Criteria Agreement or Reliability Management System (RMS) Generator Agreement with the Commission.

5. Applicant shall use reasonable efforts to remain a member of the Southwest Reserve Sharing Group, or its successor.

6. Applicant shall meet all applicable requirements for groundwater set forth in the Third Management Plan for the Phoenix Active Management Area.

7. With respect to landscaping and screening measures, including the improvements listed in the IGA, Applicant agrees to develop and implement a public process consistent with the process chart (Exhibit 89) presented during the hearings, modifying the dates in the IGA with the Town of Gilbert, if necessary, to correspond with the schedule in Exhibit 89.

   The new Community Working Group (CWG) will consist of 12 members, selected as follows: one member selected by the Town of Gilbert, four members selected by neighborhood homeowner associations, four representatives selected by intervenors, and three members selected by SRP (not part of the aforementioned groups) who were part of the original community working group. Applicant and landscaping consultants shall act as advisors to the CWG. CWG meetings shall be noticed to and be

open to the general public. The initial meeting shall take place on an evening or weekend in the Town of Gilbert.

The objective of the CWG shall be to refine the landscaping and mitigation concept plans submitted during these hearings (Exhibit 88). The CWG shall work to achieve appropriate visual mitigation of plant facilities and to facilitate the design and installation of the concept plan components so as to maximize the positive impact on the community and to increase, wherever possible, the values of the homes in the neighboring areas. The refinement of the mitigation plans shall be reasonably consistent with the planning criteria of the Town of Gilbert, the desires of neighboring homeowner associations, and the reasonable needs of Applicant.

Applicant shall retain an independent facilitator, acceptable to the CWG, to conduct the CWG meetings. It shall be the role of the facilitator to assist in initial education and in conducting an orderly and productive process. The facilitator may, if necessary, employ dispute resolution mechanisms.

The CWG shall also assist in establishing reasonable maintenance schedules for landscaping of Applicant's plant site in public-view areas.

Applicant will develop with the Town of Gilbert a continuous fund, to be administered by the Town of Gilbert, to provide for the construction and maintenance of off-site landscaping in the areas depicted in the off-site landscaping concepts as developed by the CWG in an amount sufficient to fund the concepts in Exhibit 88 or concepts developed by the CWG, whichever is greater.

8. The visual mitigation efforts shall be in general compliance with the plans and concepts presented in these proceedings and constitute a commitment level by Applicant. Applicant will not reduce the overall level of mitigation as set forth in its Application and this proceeding, except as may be reasonably changed during the CWG process. The plans agreed to by the CWG shall be approved by the Town of Gilbert.

9. Applicant shall, where reasonable to do so, plant on site trees by the fall of 2001. Because planting of trees must await the improvement of Warner Road and the design and construction of berms, this condition will largely apply to trees on the East side of the site, and some of the trees on the North side. All landscaping will be installed prior to the installation of major plant equipment such as, but not limited to, exhaust stacks, combustion turbines, and heat recovery steam generators, except where delays are reasonably necessary to facilitate construction activities.

10. Applicant shall operate the Project so that during normal operations the Project shall not exceed the most restrictive of applicable (i) HUD residential

noise guidelines, (ii) EPA residential noise guidelines, or (iii) applicable City of Tempe standards. Additionally, construction and operation of the facility shall comply with OSHA worker safety noise standards. Applicant agrees that it will use its best efforts to avoid during nighttime hours construction activities that generate significant noise. Additionally, Applicant agrees to comply with the standards set forth in the Gilbert Construction Noise Ordinance, Ordinance No. 1245, during construction of the project. In no case shall the operational noise level be more than 3 db above background noise as of the noise study prepared for this application. The Applicant shall also, to the extent reasonably practicable, refrain from venting between the hours of 10:00 p.m. and 7:00 a.m.

11. Applicant will work with the Gilbert Unified School District to assist it in converting as many as possible of its school bus fleet to green diesel or other alternative fuel, as may be feasible and determined by Gilbert Unified School District, and will contribute a minimum of $330,000 to this effort.

12. Applicant shall actively work with all interested Valley cities, including at a minimum, Tempe, Mesa, Chandler, Queen Creek and Gilbert, to fund a Major Investment Study through the Regional Public Transit Authority to develop concepts and plans for commuter rail systems to serve the growing population of the East Valley. Applicant will contribute a maximum of $400,000 to this effort.

13. Within six months of approval of this Order by the Arizona Corporation Commission, Applicant shall either relocate the gas metering facilities to the interior of the plant site or construct a solid wall between the gas metering facilities at the plant site and Warner Road. The wall shall be of such strength and size as to deflect vehicular traffic (including a fully loaded concrete truck) that may veer from Warner Road to the gas-metering site.

14. Applicant will use only SRP surface water, CAP water or effluent water for cooling and power plant purposes. The water use for the plant will be consistent with the water plan submitted in this proceeding and acceptable to the Department of Water Resources. Applicant will work with the Town of Gilbert to attempt to use available effluent water, where reasonably feasible.

15. Applicant agrees to comply with all applicable federal, state and local regulations relative to storage and transportation of chemicals used at the plant.

16. Applicant agrees to maintain on file with the Town of Gilbert safety and emergency plans relative to emergency conditions that may arise at the plant site. On at least an annual basis Applicant shall review and update, if necessary, the emergency plans. Copies of these plans will be made available to the public and on Applicant's web site. Additionally Applicant

will cooperate with the Town of Gilbert to develop an emergency notification plan and to provide information to community residents relative to potential emergency situations arising from the plant or related facilities. Applicant agrees to work with the Gilbert police and fire departments to jointly develop on site and off-site evacuation plans, as may be reasonably appropriate. This cooperative work and plan shall be completed prior to operation of the plant expansion.

17. In obtaining air offsets required by EPA and Maricopa County, Applicant will use its best efforts to obtain these offsets as close as practicable to the plant site.

18. In order to reduce the possibility of generation shortages and the attendant price volatility that California is now experiencing, SRP will operate the facilities consistent with its obligation to serve its retail load and to maintain a reliable transmission system within Arizona.

19. Beginning upon operation of the new units, Applicant will establish a citizens' committee, elected by the CWG, to monitor air and noise compliance and water quality reporting. Applicant will establish on-site air and noise monitoring facilities to facilitate the process. Additionally Applicant shall work with Maricopa County and the Arizona Department of Environmental Quality to enhance monitoring in the vicinity of the plant site in a manner acceptable to Maricopa County and the Arizona Department of Environmental Quality. Results of air monitoring will be made reasonably available to the public and to the citizens' committee. Applicant shall provide on and off-site noise monitoring services (at least on a quarterly basis), testing those locations suggested by the citizens' committee. The off-site air monitoring plan shall be funded by the Applicant and be implemented before operation of the plant expansion.

20. Applicant will explore, and deploy where reasonably practicable, the use of available technologies to reduce the size of the steam plumes from the unit cooling towers. This will be a continuing obligations throughout the life of the plant.

21. SRP will, where practicable, work with El Paso Natural Gas Company to use the railroad easements for the installation of the new El Paso gas line.

22. Other than the Santan/RS 18 lines currently under construction, Applicant shall not construct additional Extra High Voltage transmission lines (115kV and above) into or out of the Santan site, including the substation on the site.

23. Applicant will replace all Town of Gilbert existing street sweepers with certified PM10 efficient equipment. A PM10 efficient street sweeper is a street sweeper that has been certified by the South Coast Air Quality

Management District (California) to comply with the District's performance standards under its Rule 1186 (which is the standard referenced by the Maricopa Association of Governments).

24. Applicant shall work in a cooperative effort with the Office of Environmental Health of the Arizona Department of Health Services to enhance its environmental efforts.

25. Applicant shall operate, improve and maintain the plant consistent with applicable environmental regulations and requirements of the Environmental Protection Agency, the Arizona Department of Environmental Quality, Maricopa County and the Town of Gilbert.

26. Applicant shall actively work in good faith with Maricopa County in its efforts to establish appropriate standards relative to the use of distillate fuels in Valley generating facilities.

27. Applicant shall install continuous emission monitoring equipment on the new units and will make available on its website emissions data from both the existing and new units according to EPA standards. Applicant shall provide information to the public on its website in order to assist the public in interpreting the data, and provide viable information in a reasonable time frame.

28. Applicant will comply with the provisions of the Intergovernmental Agreement dated April 25, 2000 between Applicant and the Town of Gilbert, as modified pursuant to this Certificate.

29. During the proceeding neighbors to the plant site raise significant concern about the impact of the plant expansion on residential property values. In performing each of the conditions in this order Applicant, in conjunction where applicable, with the Town of Gilbert and the plant site neighbors, shall consider and attempt to maximize the positive effect of its activities on the values of the homes in the surrounding neighborhoods.

30. Applicant shall construct the auxiliary boiler stack at such height as may be determined by air modeling requirements. Applicant shall situate the auxiliary boiler stack so that it is not visible from off the plant site.

31. Applicant will construct the heat recovery steam generators ("HRSG") approximately 15 feet below grade and will construct the HRSGs so that the overall height of the HRSG module from the natural grade is no more than 80 feet.

32. Applicant will complete the installation of the dry low NOX burners on the existing units prior to the construction of the new units.

33. Applicant shall not transfer this Certificate to any other entity for a period of 20 years from the date of approval by the Corporation Commission, other than as part of a financing transaction where operational responsibilities will remain with Applicant, and where Applicant will continue to operate the plant in accordance with this Certificate.

34. Applicant shall post on its website, when its air quality permit application is submitted to the Maricopa County Environmental Services Department. Also, Applicant shall post on its website any official notice that may be required to be posted in newspapers for its air quality permit application.

GRANTED this 14th day of February, 2001

ARIZONA POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE

Paul A. Bullis

By Paul A. Bullis
Its Chairman

Attachment 7

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL July 25, 2005	No. I05-004 (R05-010) Re: Open Meeting Law Requirements and E-mail to and from Members of a Public Body

To: Donald M. Peters, Esq.
Miller, LaSota & Peters
722 East Osborn Road, Suite 100
Phoenix, Arizona 85014

Pursuant to Arizona Revised Statutes ("A.R.S.") §15-253(B), you submitted for review your opinion to the president of the Washington Elementary School District ("District") Governing Board ("Board") regarding electronic mail ("e-mail") communications to and from members of the Board and Arizona's Open Meeting Law ("OML").

This Opinion revises your analysis to set forth some parameters regarding e-mail to and from members of a public body and is intended to provide guidance to public bodies throughout the State that are subject to the OML. *See* Ariz. Att'y Gen. Op. I98-006 at 2, n.2.

Question Presented

What are the circumstances under which the OML permits e-mail to and from members of a public body?

Summary Answer

Board members must ensure that the board's business is conducted at public meetings and may not use e-mail to circumvent the OML requirements. When members of the public body are parties to an exchange of e-mail communications that involve discussions, deliberations or taking legal action by a quorum of the public body concerning a matter that may foreseeably come before the public body for action, the communications constitute a meeting through technological devices under the OML. While some one-way communications from one board member to enough members to constitute a quorum would not violate the OML, an e-mail by a member of a public body to other members of the public body that proposes legal action would constitute a violation of the OML.

Analysis

The OML is intended to open the conduct of government business to public scrutiny and prevent public bodies from making decisions in secret. *See Karol v. Bd. of Educ. Trs.*, 122 Ariz. 95, 97, 593 P.2d 649, 651 (1979). "[A]ny person or entity charged with the interpretation [of the OML] shall construe any provision [of the OML] in favor of open and public meetings." A.R.S. § 38-431.09. In addition, devices used to circumvent the OML and its purposes violate the OML and will subject the members of

the public body and others to sanctions.[1] *See e.g.* Ariz. Att'y. Gen. Ops. I99-022, n. 7; I75-7. These principles guide the analysis of the use of e-mails by members of a public body. E-mail communications to or from members of the public body are analyzed like any other form of communication, written or verbal, in person or through technological means.

A. An Exchange of E-mails Can Constitute a Meeting.

1. A Meeting Can Occur Through Serial Communications between a Quorum of the Members of the Public Body.

All meetings of public bodies must comply with the OML.[2] The OML defines a "meeting" as:

> the gathering, in person or through technological devices, of a quorum of members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to such action.

A.R.S. § 38-431(4).

The OML does not specifically address whether all members of the body must participate simultaneously to constitute a "gathering" or meeting. However, the requirement that the OML be construed in favor of open and public meetings leads to the conclusion that simultaneous interaction is not required for a "meeting" or "gathering"

---

[1] A.R.S. § 38-431-.07 (A) provides for penalties for violating the OML against not only members of the public body, but also against "[a person] who knowingly aids, agrees to aid or attempts to aid another person in violating [the OML]."

[2] A "public body" subject to the OML includes:

> the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivisions. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, such public body.

A.R.S. § 38-431(6).

within the OML. "Public officials may not circumvent public discussion by splintering the quorum and having separate or serial discussions. . . .. Splintering the quorum can be done by meeting in person, by telephone, electronically, or through other means to discuss a topic that is or may be presented to the public body for a decision." *Arizona Agency Handbook* § 7.5.2. (Ariz. Att'y Gen. 2001) Thus, even if communications on a particular subject between members of a public body do not take place at the same time or place, the communications can nonetheless constitute a "meeting." *See Del Papa v. Board of Regents*, 114 Nev. 388, 393, 956 P. 2d 770, 774 (1998) (rejecting the argument that a meeting did not occur because the board members were not together at the same time and place)[3]; *Roberts v. City of Palmdale*, 20 Cal. Rptr. 2d 330, 337, 853 P. 2d 496, 503 (1993) ("[A] concerted plan to engage in collective deliberation on public business through a series of letters or telephone calls passing from one member of the governing body to the next would violate the open meeting requirement.")[4]

2. Discussion, Proposals and Deliberations Among a Quorum of a Public Body Must Occur at a Public Meeting.

A "meeting" includes four types of activities by a quorum of the members of the public body: discussing legal action, proposing legal action, taking legal action, and deliberating "with respect to such action[s]." A.R.S. § 38-431(4). Three of these activities necessarily involve more than a one-way exchange between a quorum of members of a public body.

[3] Like the OML, Nevada's open meeting law defines a "meeting" as a gathering of a quorum of members of the public body. Nev. Rev. Stat. 241.015(2).

[4] This Office declines to follow *Beck v. Shelton*, 267 Va. 482, 491, 593 S.E.2d 195, 199 (2004) because of differences between Arizona's law and Virginia's. In *Beck*, the court concluded that "the term ['assemble'] inherently entails the quality of simultaneity." Further, the court observed that "[w]hile such simultaneity may be present when e-mail technology is used in a 'chat room' or as 'instant messaging,' it is not present

For example, the ordinary meaning of the word "discuss" suggests that a discussion of possible legal action requires more than a one-way communication. *See Webster's II New College Dictionary* 385 (1994) (defining "discuss" as "to speak together about.") Likewise, the term "deliberations" requires some collective activity. *See* Ariz. Att'y Gen. Op. I97-012, *citing Sacramento Newspaper Guild v. Sacramento Bd. of Supervisors,* 69 Cal. Rptr. 480, 485 (App. 1968) (reversed on other grounds). "Deliberations" and "discussions" involve an exchange between members of the public body, which denotes more than unilateral activity. *See* Ariz. Att'y Gen. Op. I75-8; *Webster's* at 390 ("exchange" means "to take or give up for another"; "to give up one thing for another"; "to provide in return for something of equal value.") Finally, "taking legal action" in the context of the OML requires a "collective decision, commitment or promise" by a majority of the members of a public body. A.R.S. § 38-431(3); Ariz. Att'y Gen. Op. I75-7.

Unlike discussions and deliberations, the word "propose" does not imply or require collective action. Webster's defines "propose" as "to put forward for consideration, discussion, or adoption." *Webster's II New College Dictionary* at 944. A single board member may "propose" legal action by recommending a course of action for the board to consider. For example, the statement, "Councilperson Smith was admitted to the hospital last night" is not a proposal, but "We should install a crosswalk at First and Main" is a proposal. Thus, an e-mail from a board member to enough other members to constitute a quorum that *proposes* legal action would be a meeting within the OML, even

---

when e-mail is used as the functional equivalent of letter communication by ordinary mail, courier, or facsimile transmission." *Id.*, 267 Va. at 490, 593 S.E. 2d at 199.

if there is only a one-way communication, and no other board members reply to the e-mail.[5]

3. An Exchange of Facts, as Well as Opinions, Among a Quorum of Members of a Public Body Constitutes a Meeting within the OML, if it is Reasonably Foreseeable that the Topic May Come Before the Public Body for Action in the Future.

Arizona's OML does not distinguish between communication of facts or opinions. An exchange of facts, as well as opinion, may constitute deliberations under the OML. *See* Ariz. Att'y Gen. Ops. I97-012, I79-4; I75-8.[6] The term "deliberations" as used in A.R.S. § 38-431 means "any exchange of facts that relate to a matter which foreseeably might require some final action . . .." Ariz. Att'y Gen. Op. I75-78; *see also Sacramento Newspaper Guild,* 69 Cal. Rptr. at 485 (deliberation connotes not only collective discussion, but also the collective acquisition and exchange of facts preliminary to the final decision).

Of course, the OML applies only to an exchange of facts or opinions if it is foreseeable that the topic may come before the public body for action. *See Valencia v. Cata*, 126 Ariz. 555, 556-57, 617 P.2d 63, 64-5 (App. 1980); Ariz. Att'y Gen. Op. 75-8. The scope of what may foreseeably come before the public body for action is determined

[5] It might be argued that because the definition of meeting refers to a gathering of a quorum at which *they* discuss, propose or take legal action, the definition only applies to proposals made by a quorum or circumstances in which more than one person actually makes a proposal. That interpretation, however, is inconsistent with the ordinary meaning of the word "propose" and with the process for proposing legal action for consideration by public bodies. It is also contrary to the directive that the OML be construed broadly to achieve its purposes.

[6] Unlike Arizona, some states permit exchanges of information among a quorum of a public body outside of public meetings. *See* Fla. AGO 2001-20, 2001 WL 276605 (Fla. A.G.) ("[C]ommunication of information, when it does not result in the exchange of council members' comments or responses on subjects requiring council action, does not constitute a meeting subject to [Florida's sunshine law]). As in many other states, Florida's open meeting law is known as its "sunshine law."

by the statutes or ordinances that establish the powers and duties of the body. *See* Ariz. Att'y Gen. Op. I00-009.

4. Applying OML Principles to E-mail.

Few reported decisions discuss when the use of e-mail violates a state's open meeting law. In *Wood v. Battle Ground School District*, 107 Wash. App. 550, 564, 27 P. 3d 1208, 1217 (2001), the Washington Court of Appeals held that the exchange of e-mail messages may constitute a meeting within Washington's Open Public Meetings Act. While the court held that "the mere use or passive receipt of e-mail does not automatically constitute a 'meeting'," it concluded that the plaintiff established a *prima facie* case of "meeting" by e-mails because the members of the school board exchanged e-mails about a matter, copying at least a quorum and sometimes all of the other members. The court said, "[T]he active exchange of information and opinions in these e-mails, as opposed to the mere passive receipt of information, suggests a collective intent to deliberate and/or to discuss Board business." 107 Wash. App. at 566, 27 P. 3d at 1218.

Although the Washington Open Public Meetings Act is not identical to the OML, like the OML, it broadly defines "meeting" and "action," and includes the directive that the law be liberally construed in favor of open and public meetings. 107 Wash. App. at 562, 27 P. 3d at 1216. The holding of the court in *Wood* and its attendant analysis are, therefore, persuasive.

The available case law and Arizona's statutory language indicate that a one-way communication by one board member to other members that form a quorum, with no further exchanges between members, is not a *per se* violation of the OML. Additional facts and circumstances must be evaluated to determine if the communication is being

used to circumvent the OML. A communication that proposes legal action to a quorum of the board would, however, violate the OML, even if there is no exchange among the members concerning the proposal. In addition, passive receipt of information from a member of the staff, with nothing more, does not violate the OML. *See Roberts,* 20 Cal. Rptr. 2d at 337, 853 P. 2d at 503 (receipt of a legal opinion by members of a public body does not result in a meeting.); *Frazer v. Dixon Unified Sch. Dist.*, 18 Cal. App. 4th 781, 797, 22 Cal. Rptr. 2d 641, 657 (1993) (passive receipt by board members of information from school district staff is not a violation of the open meeting law).[7]

There are risks whenever board members send e-mails to a quorum of other board members. Even if the first e-mail does not violate the open meeting law, if enough board members to constitute a quorum respond to the e-mail, there may be a violation of the OML. In addition, a quorum of the members might independently e-mail other board members on the same subject, without knowing that fellow board members are also doing so. This exchange of e-mails might result in discussion or deliberations by a quorum that could violate the OML. Because of these potential problems, I strongly recommend that board members communicate with a quorum about board business at open public meetings, not through e-mails.

B. Hypotheticals Illustrating the Use of E-mail.

The analysis of the OML and e-mail is theoretically no different than analyzing other types of communications. To provide additional guidance, this Opinion will address

[7] This office has also opined that, in the context of a Call to the Public, passive receipt of information does not constitute a meeting. Ariz. Att'y Gen. Op. I99-006.

OML applications to specific factual scenarios.[8]

a. E-mail discussions between less than a quorum of the members that are forwarded to a quorum by a board member or at the direction of a board member would violate the OML.

b. If a staff member or a member of the public e-mails a quorum of members of the public body, and there are no further e-mails among board members, there is no OML violation.

c. Board member A on a five-member board may not e-mail board members B and C on a particular subject within the scope of the board's responsibilities and include what other board members D and E have previously communicated to board member A. This e-mail would be part of a chain of improper serial communications between a quorum on a subject for potential legal action.

d. A board member may e-mail staff and a quorum of the board proposing that a matter be placed on a future agenda. Proposing that the board have the opportunity to consider a subject at a future public meeting, without more, does not propose legal action, and, therefore, would not violate the OML.

e. An e-mail from the superintendent of the school district to a quorum of the board members would not violate the OML. However, if board members reply to the superintendent, they must not send copies to enough other members to constitute a quorum. Similarly, the superintendent must not forward replies to the other board members.

f. One board member on a three-member board may e-mail a unilateral communication to another board member concerning facts or opinions relating to board business, but board members may not respond to the e-mail because an exchange between two members would be a discussion by a quorum.

g. A board member may copy other board members on an e-mailed response to a constituent inquiry without violating the OML because this unilateral communication would not constitute discussions, deliberations or taking legal action by a quorum of the board members.

h. An e-mail request by a board member to staff for specific information does not violate the OML, even if the other board members are copied on the e-mail. The superintendent may reply to all without violating the OML as long as that response does not communicate opinions of other board members. However, if board members reply in a communication that includes a quorum, that would constitute a discussion or deliberation and therefore violate the OML.

[8] These hypotheticals assume that the e-mails are not sent by board members or at a board member's direction with the purpose of circumventing the OML and that any unilateral communications do not propose legal action.

i. A board member may use e-mail to send an article, report or other factual information to the other board members or to the superintendent or staff member with a request to include this type of document in the board's agenda packet. The agenda packet may be distributed to board members via e-mail. Board members may not discuss the factual information with a quorum of the board through e-mail.

C. Measures to Help Ensure that the Public Body Conducts Its Business in Public.

Although it is not legally required, I recommend that any e-mail include a notice advising board members of potential OML consequences of responding to the e-mail. Possible language for a notice for e-mails from the superintendent or staff is as follows:

> To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other members of the public body. Members of the public body may reply to this message, but they should not send a copy of the reply to other members.

Language for e-mails from board members could be the following:

> To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other board members and board members should not reply to this message.

Although the OML does not require the above notice, such notification may serve as a helpful reminder to board members that they should not discuss or deliberate through e-mail.

It is also important to remember that e-mail among board members implicates the public records law, as well as the OML. E-mails that board members or staff generate pertaining to the business of the public body are public records. *See Star Publ'g Co. v. Pima County Attorney's Office,* 181 Ariz. 432, 891 P.2d 899 (App. 1994); *see also Arizona Agency Handbook* § 6.2.1.1 (Ariz. Att'y Gen. 2001). Therefore, the e-mails must be preserved according to a records retention program and generally be made available

for public inspection. A.R.S. §§ 39-121, 41-1436. Although the OML focuses on e-mails involving a quorum of the members of the public body, the public records law applies to any e-mail communication between board members or board members and staff. Public bodies might consider maintaining a file that is available for public inspection and contains any e-mails sent to and from board members. Ready access to this type of information helps ensure compliance with the legislative mandates favoring open government.

I encourage all public bodies to educate board members and staff concerning the parameters of the OML and the public records law to ensure compliance with these laws. E-mail is a useful technological tool, but it must be used in a manner that follows the OML's mandate that all public bodies propose legal action, discuss, deliberate, and make decisions in public.

Conclusion

E-mail communications among a quorum of the board are subject to the same restrictions that apply to all other forms of communications among a quorum of the board. E-mails exchanged among a quorum of a board that involve discussions, deliberations or taking legal action on matters that may reasonably be expected to come before the board constitute a meeting through technological means. While some unilateral e-mail communications from a board member to a quorum would not violate the OML, a board member may not propose legal action in an e-mail. Finally, a quorum of the board cannot use e-mail as a device to circumvent the requirements in the OML.

Terry Goddard
Attorney General

450529

Attachment 8

Ariz. Op. Atty. Gen. No. I97-012, 1997 WL 566675 (Ariz.A.G.)

Office of the Attorney General
State of Arizona

I97
-
012
(R97-018)

August 18, 1997

The Honorable Jerry Overton

Dear Representative Overton:

You have asked whether the board of directors ("Board") of a homeowners association of a planned community can hold informal meetings to merely discuss, but not vote on or approve, Board matters without providing notice to association members and giving them the opportunity to attend. We conclude that the legislative directive in Arizona Revised Statutes Annotated ("A.R.S.") § 33-1804 prohibits a quorum of a Board from holding informal meetings to discuss Board business unless it provides notice to the association's members and an opportunity for them to attend the meetings.

Background

In 1994 the Legislature enacted a set of laws to govern meetings held by an association or Board of a planned community. 1994 Ariz. Sess. Law ch. 310, § 1 (enacting A.R.S. §§ 33-1901 through -1906, renumbered and now consisting of A.R.S. §§ 33-1801 through -1807). The legislation defines an "association" as:

> a nonprofit corporation or unincorporated association of owners created pursuant to a declaration to own and operate portions of a planned community and which has the power under the declaration to assess association members to pay the costs and expenses incurred in the performance of the association's obligations under the declaration.

A.R.S. § 33-1802(1). A "planned community" is:

> a real estate development which includes real estate owned and operated by a nonprofit corporation or unincorporated association of owners, created for the purpose of managing, maintaining or improving the property, and in which the owners of separately owned lots, parcels or units are mandatory members and are required to pay assessments to the association for these purposes.

A.R.S. § 33-1802(4). [FN1]

According to A.R.S. § 33-1804(A), all meetings of an association and its Board must

be open to all association members, and all members must be permitted to attend and listen to the deliberations and proceedings, with certain limited exceptions. [FN2] Notice of *association* meetings must be provided to each association member by hand-delivery or mail within at least ten days, but no more than fifty days, prior to the meeting, unless otherwise provided in the association's articles or bylaws. A.R.S. § 33-1804(B). Notice of *Board* meetings that are held after the termination of declarant control of the association must be given to association members by newsletter, conspicuous posting, or other reasonable means, A.R.S. § 33-1804(C), at least forty-eight hours prior to the meeting, unless the association's articles or bylaws provide otherwise. 1997 Ariz. Sess. Laws ch. 40, § 5 (effective July 21, 1997). However, Board meetings may be held without notice if emergency circumstances demand Board action before notice can be given. A.R.S. § 33-1804(C).

Confusion has arisen in the past with respect to the applicability of Arizona's Open Meeting Law, A.R.S. §§ 38-431 through -431.09, to meetings of homeowners associations. The Open Meeting Law applies only to public bodies. [FN3] A.R.S. § 38-431.01. Homeowners associations and their Boards are not public bodies and, therefore, are not within the purview of the Open Meeting Law. The Attorney General, County Attorneys, and other public lawyers are not authorized to enforce the special open meeting laws applicable to homeowners associations (A.R.S. § 33-1804) or condominium associations (A.R.S. § 33-1248).

Analysis

A. A.R.S. § 33-1804(A) Requires Association and Board Meetings to Be Open.
To determine whether the open meeting and notice requirements in A.R.S. § 33-1804 apply to informal Board meetings at which the Board does not vote or approve matters, we first look to the language of the statute. The primary rule of statutory construction is to determine legislative intent. *Mail Boxes v. Industrial Comm'n*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). The best source of a statute's meaning is its language, and when the language is unambiguous, it is determinative of the statute's construction. *Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991). Section 33-1804(A), A.R.S., states that "all meetings of the association and board of directors are open to all members of the association and all members so desiring shall be permitted to attend and listen to the deliberations and proceedings ...."

Because A.R.S. § 33-1804 does not limit or define "meeting" or give direction as to when a gathering of Board members constitutes a "meeting," we look elsewhere for guidance. Section 1-216(B), A.R.S., states that a majority of a board or commission constitutes a quorum. We may also look to how the word is used in similar settings. *See State ex rel. Larson v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970) (statutes with the same general purpose should be construed together, even if the statutes do not reference one another or are in different chapters of the A.R.S.). Arizona's Open Meeting Law defines a "meeting" as a gathering of a quorum of members of a public body to propose or take legal action, including deliberations regarding such action. A.R.S. § 38-431(3). Piecing these components together, we conclude that if a quorum of the Board meets and discusses Board matters, either formally or informally, that constitutes a "meeting" and the Board must follow the open meeting and notice requirements of A.R.S. § 33-1804. If fewer than a quorum of Board members meet, the requirements of A.R.S. § 33-1804 do not apply.

The statute permits all association members to attend and listen to the "deliberations and proceedings" of the Board. A.R.S. § 33-1804(A). Neither A.R.S. §§ 33-1802 nor 33-1804 defines the terms "deliberations" and "proceedings." We must construe words according to their common and approved use. A.R.S. § 1-213. In the context of the Open Meeting Law, we previously concluded that "deliberations" include "any exchange of facts that relate to a matter which foreseeably might require some final action ...." Ariz. Att'y Gen. Op. I79-4; *see also* *Sacramento Newspaper Guild v. Sacramento Bd. of Supervisors*, 69 Cal. Rptr. 480, 485 (App. 1968) (deliberation connotes not only collective discussion, but also the collective acquisition and exchange of facts preliminary to the final decision). "Proceedings" encompasses one step or a series of steps to accomplish something. WEBSTER'S THIRD NEW INT'L DICTIONARY 1807 (1993). The Legislature's use of the terms "deliberations" and "proceedings" indicates that the two terms are separate and distinct steps of the decision-making process that must be open to the association's members. *See* *Sacramento Newspaper Guild*, 69 Cal. Rptr. at 485. Based on the Legislature's use of these expansive terms, A.R.S. § 33-1804 includes both informal and formal discussions regarding Board matters and other actions of the Board.

Where language is unambiguous, it is normally conclusive, absent clear legislative intent to the contrary. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 592, 667 P.2d 1304, 1307 (1983). Because the language of A.R.S. § 33-1804(A) is unambiguous, we could stop our analysis here, but additional factors support our conclusion that the statute governs informal meetings as well as formal meetings of the Board.

B. Legislative History and Public Policy Reasons Support Interpreting the Statutory Language as Mandating Open Meetings.

The legislative history and general policies behind this specialized open meeting law also support our determination concerning the interpretation of A.R.S. § 33-1804. The purpose of the legislation creating A.R.S. §§ 33-1801 through -1807 was to open Board meetings and enhance homeowners' rights by allowing them to attend the meetings. *See* Minutes of the Senate Committee on Commerce and Economic Development, 41st Legislature, 2nd Reg. Sess. (March 9, 1994). This intent parallels the intent behind the Open Meeting Law, which is to open the conduct of government business to the public's scrutiny and to prohibit decision-making in secret. *See* *Karol v. Board of Educ. Trustees*, 122 Ariz. 95, 97, 593 P.2d 649, 651 (1979). Based on the Legislature's intent, we will promote open meetings by interpreting A.R.S. § 33-1804 in a way that prohibits attempts to frustrate the statute's purpose. *Cf.* *Fisher v. Maricopa County Stadium Dist.*, 185 Ariz. 116, 124, 912 P.2d 1345, 1353 (App. 1995) (exemptions to the Open Meeting Law must not be interpreted so broadly as to frustrate the Open Meeting Law).

Informal meetings may allow crystallization of decisions to a point just short of ceremonial acceptance. *See* *Sacramento Newspaper Guild*, 69 Cal. Rptr 480, 487 (App. 1968). Thus, interpreting A.R.S. § 33-1804 to allow the Board to meet informally without providing notice to association members subverts the law. Also, discussion that takes place at an informal meeting on an issue that will later come before the Board will limit discussion at a subsequent formal meeting on the issue, thus preventing association members from hearing the policy, motivations, and other

important factual information involved in the Board members' decision. *Bagby v. School District No. 1, Denver*, 528 P.2d 1299, 1302 (Colo. 1974). Likewise, Board members not present at the informal meeting would also be disadvantaged by not being informed about the background information and informal discussions shared by members at the informal meeting. Moreover, while a Board is not a public body with obligations to the public, a Board of an association has duties that directly affect association members. For example, the association assesses members for the costs and expenses incurred in the performance of the association's obligations, A.R.S. § 33-1802(1) and (4), and the Board may penalize members who do not pay assessments or who are late in making payment. *See* A.R.S. § 33-1803.

We have previously opined with respect to a similar issue. In Ariz. Att'y Gen. Op. I88-055, we advised the Green Valley Community Coordinating Council, Inc., which was essentially a homeowners association, that "the council should be strongly encouraged to always conduct public meetings which are properly noticed. Because it is obvious that the council has a great deal of influence on community affairs, we believe the public should always be invited to attend, observe and even participate in the Council's deliberations." The Legislature's subsequent enactment in 1994 of the laws requiring planned communities' associations and their Boards to hold open meetings bolstered our advice that meetings of such groups should be open to the public.

Conclusion

We conclude that a Board of a planned community's homeowner association must follow the open meeting and notice provisions of A.R.S. § 33-1804 if a quorum of the Board meets informally to discuss Board matters, regardless of whether the Board votes or takes any action on any matters.

Sincerely,
Grant Woods
Attorney General

[FN1]. Although your letter referred to a "homeowner's association," we assume from the context of your request that your question pertained to an informal meeting of Board members of an association of a planned community. Sections 33-1801 through -1807 are only applicable to associations of a planned community as defined in A.R.S. § 33-1804(1) and (4), quoted above. Condominium associations are governed by A.R.S. § 33-1201 through -1270, and are subject to a different open meeting statute, A.R.S. § 33-1248.

[FN2]. Exceptions to the requirements of A.R.S. § 33-1804(A) allow the Board to hold closed meetings for consideration of employment or personnel matters; legal advice from the Board's or the association's attorney; pending or contemplated litigation; and pending or contemplated matters regarding enforcement of the association's documents or rules.

[FN3]. "Public body" is defined in A.R.S. § 38-431(5) as:

> the legislature, all boards and commissions of the state or political subdivisions, all multi-member governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions,

including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, such public body.

Ariz. Op. Atty. Gen. No. I97-012, 1997 WL 566675 (Ariz.A.G.)
END OF DOCUMENT

Attachment 9

DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

BOB CORBIN
ATTORNEY GENERAL

January 9, 1979

Mr. Q. Dale Hatch
Deputy County Attorney
Office of the Maricopa County Attorney
400 Superior Court Building
101 West Jefferson
Phoenix, Arizona 85003

Re: I79-4 (R78-274)

Dear Mr. Hatch:

The following is a revision of your September 11, 1978 opinion addressed to the Superintendent of the Glendale Union High School District. While we agree with the answers you posited in that opinion, the importance of the subject matter calls for these further comments.

The four questions posed by the Superintendent concern what constitutes a meeting for purposes of the notice and public attendance requirements of the Open Meetings Law. As you properly point out, the term "meeting" is defined by A.R.S. § 38-431(3) as follows:

> "'Meeting' means the gathering of a quorum of members of a public body to propose or take legal action, including any deliberations with respect to such action."

Simplifying this definition to its logical parameters, a meeting, in this context, is a gathering of three or more members of a five-member board, which results in deliberations relating to any matter within their official function. In Op.Atty.Gen. No. 75-8, we examined the meaning of "deliberations" as defined by various courts, and concluded that deliberations would include any exchange of facts that relate to a matter which foreseeably might require some final action by the Board. For example, the court in Sacramento Newspaper Guild v. Sacramento

Board of Supervisors, 263 Cal.App. 2d 41 69 Cal.Rptr. 480 (1968) concluded that luncheon at the Elks Club attended by the Sacramento County Board of Supervisors and others to discuss a strike of social workers against the county was a meeting governed by the provisions of the California Open Meetings Law.

The first questions posed to you was whether members of a Board of Education may meet informally at a library, private home or school facility to discuss philosophical issues, thoughts about education or general feelings relative to their responsibilities, without posting the same and permitting the general public to attend.

Whether the Open Meetings Law would apply to "informal gatherings" at which Board of Education members discuss philosophical issues relative to education generally or to their particular responsibilities depends upon the substance of the matters discussed and not the label given to the meeting or its location. Op.Atty.Gen. 75-8. Although, it is conceivable that board members may meet to discuss philosophical issues without entering "deliberations," extreme care should be exercised that no discussions which could be construed as preliminary to legal actions take place, since harsh sanctions are imposed for violations of the Open Meetings Law. Moreover, if members of the board habitually held such "informal gatherings," courts would likely give close scrutiny to the overall picture to determine whether the Open Meetings Law was being subtly circumvented. See, Bagby v. School District No. 1, Denver, 528 P.2d 1299 (Colo. 1974).

The second question posed concerned whether the definition of "meetings" precluded a Board of Education or members thereof from meeting socially if educational issues or unofficial school business is discussed.

A majority of the Board may meet socially only if there are no deliberations on matters which may foreseeably require final action by the Board. "Educational issues" and "unofficial school business" are vague terms but could include matters which would impose the Open Meetings Law requirements.

The third question you dealt with asked the circumstances under which a Board of Education could meet privately without posting notice as to place, time and substance of the meeting.

Board members may have social contacts without complying with the Open Meetings Law so long as they do not engage in deliberations, consultations or considerations which may fore-

seeably require final action by the Board. Borderline situations should be avoided because of the sanctions for violation of the Open Meetings Law:

> "The remedies available for violations of the Open Meetings Law include criminal prosecution and civil injunctive actions. In addition, violations of the Open Meetings Law may constitute grounds for removal of a public officer from his official position." Atty.Gen.Op. 78-97.

The fourth question posed to you asked whether two board members out of a body of five may meet privately and carry on discussions relative to educational issues?

As previously stated, the definition of "meeting" includes only those instances when a quorum of members of a public body gather. If there is less than a quorum then the Open Meetings Law does not apply. However, as we noted in Op.Atty. Gen. No. 75-8 at page seven:

> "It should be pointed out, however, that such discussions and deliberations between less than a majority of the members of a governing body, or other devices, when used to circumvent the purposes of the Act, would constitute a violation which would subject the governing body and the participating members to the several sanctions provided for in the Act."

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General

BC:mm

Attachment 10

BRUCE E. BABBITT, THE ATTORNEY GENERAL
STATE CAPITOL
PHOENIX, ARIZONA

August 29, 1975

DEPARTMENT OF LAW OPINION NO. 75-8 (R-10) (R75-81)

REQUESTED BY: PAUL R. BOYKIN
Executive Director
Arizona State Board of Medical Examiners

QUESTIONS:

1. Does the Arizona Open Meeting Law apply to the 90-10 agencies of this state?

2. If the answer to the first question is yes, does the Open Meeting Law apply to the following:

   A. Investigational proceedings of the Board of Medical Examiners?

   B. Informal interview provided for in A.R.S. § 32-1451.B?

   C. The personal deliberations and review of evidence by members of the Board of Medical Examiners following the completion of a hearing provided for in A.R.S. § 32-1451?

ANSWERS:

1. Yes. See Department of Law Opinion No. 75-7, issued on August 19, 1975.

2. See body of opinion.

Since the Arizona State Board of Medical Examiners is a "governing body" as defined in the Open Meeting Act and since there is no exception to the Act for contested case or quasi-judicial proceedings (see Opinion No. 75-7), the Board is subject to the Act in all the cases described in Question 2 to

the extent that it is taking "legal action".[1] "Legal action" is defined in the Act as follows:

> "Legal action" means a collective decision, commitment or promise made by a majority of the members of a governing body consistent with the constitution, charter or bylaws of such body, and the laws of this state.
>
> A.R.S. § 38-431.2.

It is the opinion of this office that the term "legal action", as defined in A.R.S. § 38-431.2 must be construed to extend beyond the mere formal act of voting. Discussions and deliberations by members of the governing body prior to the final decision are an integral and necessary part of any "decision, commitment or promise", and we believe are included within the definition of "legal action". See Times Publishing Company v. Williams, 222 So.2d 470 (Fla. 1969).

The declaration of policy as set forth in § 1, Ch. 138, Laws 1962, provides compelling authority for this conclusion.

> It is the public policy of this state that proceedings in meetings of governing bodies of the state and political subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this act that their official deliberations and proceedings be conducted openly. (Emphasis added.)

This section indicates a legislative intent to expose to public view all "official deliberations and proceedings" of

---

1/ It makes no difference what descriptive label or formality is accorded to the assemblage of board members. It may be called a formal or informal meeting or a luncheon. If legal action is taken, the assemblage is subject to the Act. See Sacramento Newspaper Guild v. Sacramento Board of Supervisors, 263 C.A. 41, 69 Cal.Rptr. 480, 487 (1968).

governing bodies. Likewise, A.R.S. § 38-431.01, which is the main operative section of the Open Meeting Act, provides in part that:

> A. All official meetings at which any legal action is taken by governing bodies shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. . . . (Emphasis added.)

Although the Act does not define "deliberations", it does define the term "proceedings" as follows:

> "Proceedings" means the transaction of any functions affecting citizens of the state by an administrative or legislative body of the state or any of its counties or municipalities or other political subdivisions.
>
> A.R.S. § 38-431.3.

"Deliberation" is defined in Black's Law Dictionary, 4th ed., as follows:

> The act or process of deliberating. The act of weighing and examining the reasons for and against the contemplated act or course of conduct or a choice of acts or means.

The California Court of Appeals in the case of Sacramento Newspaper Guild v. Sacramento Board of Supervisors, 263 C.A. 41, 69 Cal.Rptr. 480 (1968), described the process of "deliberation" as follows:

> To "deliberate" is to examine, weigh and reflect upon the reasons for or against the choice. [Citation omitted.] Public choices are shaped by reasons of facts, reasons of policy or both. Any of the agency's functions may include or depend upon the ascertainment of facts. [Citation

> omitted.] Deliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts perliminary to the ultimate decision.
>
> 69 Cal.Rptr. at 485.

Accordingly, it is clear that the words "deliberations" and "proceedings" encompass the entire decision-making process.

Not only does the language used by the Legislature compel a broad interpretation of "legal action", the case law in other states leaves little room for argument. The Florida Supreme Court probably best described the rationale for extending the scope of activities to be covered by an open meeting law in the case of Times Publishing Company v. Williams, supra, wherein it stated:

> Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire decision-making process that the legislature intended to affect by the enactment of the statute before us. This act is a declaration of public policy, the frustration of which constitutes irreparable injury to the public interest. Every step in the decision-making process, including the decision itself, is a necessary preliminary to formal action. It follows that each such step constitutes an "official act", an indispensable requisite to "formal action", within the meaning of the act.
>
> * * *
>
> It is our conclusion, therefore, that with one narrow exception which we will discuss later, the legislature intended the provisions of Chapter 67-356 to be applicable to every assemblage of a board or commission governed by the act at which any discussion, deliberation, decision, or

formal action is to be had, made or taken relating to, or within the scope of, the official duties or affairs of such body.

222 So.2d at 473-474.

In a recent case, the Supreme Court of Florida restated its interpretation of Florida's Open Meeting Law as follows:

> One purpose of the government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority adopted and established by a governmental agency, and relates to any matter on which foreseeable action is taken.
>
> Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974).

The fact that the Legislature amended the Act in 1974 to bring within the coverage of the Act committees and subcommittees of governing bodies, provides further support for a broad interpretation of "legal action". The California Court of Appeals considered this point in the case of Sacramento Newspaper Guild v. Sacramento Board of Supervisors, supra.

> Without troubling the lexicographers, one recognizes a committee as a subordinate body charged with investigating, considering and reporting to the parent body upon

> a particular subject. Normally, committees investigate, consider and report, leaving the parent body to act. By the specific inclusion of committees and their meetings, the Brown Act [California's Open Meeting Act] demonstrates its general application to collective investigatory and consideration activity stopping short of official action.
>
> 69 Cal.Rptr. at 486.

The court went on to state that:

> An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate those evasive devices. [Footnote omitted.] As operative criteria, formality and informality are alien to the law's design, exposing it to the very evasions it was designed to prevent. Construed in the light of the Brown Act's objectives, the term "meeting" extends to informal sessions or conferences of the board members designed for the discussion of public business. The Elks Club luncheon, attended by the Sacramento County board of supervisors, was such a meeting.
>
> 69 Cal.Rptr. at 487.

It is also instructive to note that the Legislature in amending the Act in 1974 provided expressly for the use of executive sessions under five different circumstances. Specifically, A.R.S. § 38-431.03, added Laws 1974, provides for the use of executive sessions for the "discussion or consideration" of personnel matters (paragraph 1) and confidential records (paragraph 2) and for the "discussion or consultation" with attorneys for purposes of obtaining

legal advice (paragraph 3), with representatives of employee organizations (paragraph 4) and for purposes of international and interstate negotiations (paragraph 5). This section also prohibits the governing body from taking any "final action or making any final decision" in the executive session. Obviously the Legislature, in making an express exception to the open meeting requirement for certain types of "discussions, considerations and consultation", must have considered such conduct generally subject to the requirements of the Act. In other words, to construe "legal action" to include only the final decision of a body, to the exclusion of the deliberations leading up to the decision would render the executive session provisions found in A.R.S. § 38-431.03 idle and nugatory. Such a construction must be avoided. State v. Edwards, 103 Ariz. 487, 446 P.2d 1 (1968).

Not all "discussions, considerations and consultations", however, are required to be done in an open meeting. The definition of "legal action" contemplates actions by "a majority of the members of a governing body." Accordingly, it is our opinion that all discussions, deliberations, considerations or consultations among a majority of the members of a governing body regarding matters which may foreseeably require final action or a final decision of the governing body, constitute "legal action" and must be conducted in an open meeting, unless an executive session is authorized. It should be pointed out, however, that such discussions and deliberations between less than a majority of the members of a governing body, or other devices, when used to circumvent the purposes of the Act, would constitute a violation which would subject the governing body and the participating members to the several sanctions provided for in the Act. See Town of Palm Beach v. Gradison, supra.

In regard to your second question, it is our opinion that, to the extent a majority of the members of the Board consider matters in investigational proceedings and informal interviews which may foreseeably require the Board to take final action or make a final decision, the members must conduct those proceedings in an open meeting, unless an executive session is authorized.

The final example given in Question 2 of the deliberations and review of evidence by members of the Board following an adjudicatory hearing is subject to the requirements of the Act and must be conducted in an open meeting.

Respectfully submitted,

BRUCE E. BABBITT
Attorney General

BEB:PMM:lc

Attachment 11

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL September 29, 2008	No. I08-008 (R08-036) Re: Application of Open Meeting Law to Meetings of Public Bodies Conducted Online

To: A. Dean Pickett, Esq.
Mangum, Wall, Stoops & Warden, P.L.L.C.

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), you submitted for review your opinion to the Superintendent of the Camp Verde Unified School District Governing Board (the "Board") regarding the Board's ability to conduct a meeting through the Internet during which the Board would engage in deliberations and discussion. This Office concurs with your conclusion that, after providing proper notice and an agenda in accordance with the Open Meeting Law and implementing procedures designed to safeguard the public's access to the meeting, a public body can conduct an online meeting to allow deliberation and discussion about matters within the public body's jurisdiction. We issue this Opinion to provide guidance concerning this matter to all public bodies subject to the Open Meeting Law. *See* Ariz. Att'y Gen. Op. I06-003.

Question Presented

Does the Open Meeting Law, A.R.S. §§ 38-431 to 38-431.09, allow the governing board of a school district to conduct deliberations and discussion in an online meeting when the Board provides proper notice under the law and facilitates public access to the online meeting through the Internet?

Summary Answer

Yes. The definition of "meeting" under A.R.S. § 38-431 includes the gathering of a quorum of a public body through technological devices and would encompass serial communications of a quorum of the public body through the Internet or other online medium. Measures must be taken, however, to provide clear notice to the public about when the Board will be deliberating in its online meeting and to facilitate the public's access to the meeting.

Analysis

You have asked this Office to evaluate your opinion regarding a proposal by the Board to conduct online meetings to discuss and edit documents. The Board does not propose to take any legal action during the online meeting. The Board meeting would be conducted online for a defined time period with members accessing the document over the Internet to comment and propose changes. Board members would not necessarily be editing or commenting on the document simultaneously. The public could also access the document over the Internet, but could only review changes and comments made by the Board members.[1] The public would be able to see which Board member proposed each change or submitted a comment. The Board proposes to offer free computer access at or near its offices during the online meeting. After

[1] Under the Open Meeting Law, the Board is not required to offer editing or commenting rights to the public. The public has the right to attend and observe the Board's proceedings, but no right to participate in the proceedings unless the Board allows it. A.R.S. § 38-431.01.

the online meeting for comment and revision ends, the Board would conduct a traditional meeting at its office to take legal action to adopt the final version of the document. At this meeting, the Board would include a call to the public so that members of the public could address comments about the document to the Board. Under these circumstances, is a "virtual meeting" in which Board members participate through serial communications over the Internet in compliance with the requirements of the Open Meeting Law?

Construed in a fashion most favorable to open and public meetings, as directed by the Legislature in A.R.S. § 38-431.09, the Open Meeting Law allows the Board to hold a virtual meeting through technological devices if it otherwise complies with the requirements of the statute. Under the Open Meeting Law, "all meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings." A.R.S. § 38-431.01. A "meeting" consists of "the gathering, in person *or through technological devices*, of a quorum of members of a public body at which they discuss, propose, or take legal action, including any deliberations by a quorum with respect to such action." A.R.S. § 38-431(4) (emphasis added). The Open Meeting Law clearly contemplates the ability of the Board to hold meetings through the use of technological devices, such as telephones, video-cameras, or even web-cameras, in which all members of the body are present simultaneously to discuss the Board's business.

Additionally, the statute allows the Board to meet through serial communications to discuss and deliberate about Board business if accomplished in compliance with the terms of the Open Meeting Law. This Office previously opined that serial e-mail communications without notice or public access between a quorum of a public body's members about public business constituted a meeting through technological devices that violated the Open Meeting

Law. Ariz. Att'y Gen. Op. I05-004. In that opinion, the Attorney General noted that "even if communications on a particular subject between members of a public body do not take place at the same time or place, the communications can nonetheless constitute a 'meeting.'" *Id.* at 4. Thus, the Board can conduct a virtual meeting in which a quorum of Board members contribute comments and edits to a document posted on the Internet through serial communications if the Board complies with the notice requirements, minute-keeping requirements, and other provisions of the Open Meeting Law.[2] To comply with the statute, the public must be able to access the entire course of discussion or deliberation between the Board members and be able to identify which Board members contributed which edits or comments. In addition, the Board must ensure that it creates a document retention policy under the public records statute to govern the maintenance and preservation of electronic documents created in this process.

Although using technology may provide broader access to the public than would otherwise be possible, virtual meetings such as those proposed by the Board also provide potential obstacles for public access based on uncertainty about the timing of the meeting, lack of equipment necessary to access the meeting, or unfamiliarity with operating such equipment. To offset these risks, this Office encourages the Board to strictly comply with the notice and minute-keeping requirements of the Open Meeting Law and to facilitate the public's access to

---

[2] We note that under A.R.S. § 38-431.01(A), any member of the public who so desires must be permitted to "attend *and listen* to the deliberations and proceedings" in an open meeting. (Emphasis added.) It is unlikely that this provision restricts the requirements of the Open Meeting Law to only allow meetings in which every person can hear the proceedings. In the case of an agency like the Arizona Commission for the Deaf and Hard of Hearing, some members of the public 'listen" to proceeding by observing sign language interpreters. It would be inconsistent with the purpose of the Open Meeting Law to find a violation of the statute because not every member of the public can listen to an audible meeting. *See* A.R.S. § 38-431.09. We conclude that the mandate to interpret the Open Meeting Law in favor of open and public meetings requires an interpretation of "listen" that includes other methods of observing deliberations and proceedings of a board, including non-audible methods.

the virtual meeting. Because not all citizens own a computer or have Internet access, the Board should take measures at its facility to allow public access to the on-line meeting. Your suggestions that the Board provide free Internet access at or near the Board office and maintain regular print-outs of the results of the on-line meeting for public review provide valid solutions to address these concerns. Regarding the notice for the on-line meeting, the Board should provide clear notice of when the meeting will begin and end, as well as clear instructions on how to access the meeting or to operate any software used by the Board to host the on-line meeting. The notice should also indicate to the public how the Board intends to facilitate public access, including the location of any free Internet access offered by the Board or printouts of the results of the on-line meeting. In addition, the notice should also include the proposed date and time of the meeting at which the Board intends to take final action adopting the proposed document. The Board must also offer reasonable accommodations to any member of the public with a disability that requests accommodation, as required by federal law.[3]

Conclusion

The Board can lawfully hold a virtual meeting, including one comprised of serial communications through the Internet, under the Open Meeting Law. Continuing developments in telecommunications technology offer the promise of widening the public's access to meetings held by public bodies, whether by web-casting meetings or allowing other forms of virtual meetings. This promise, however, is counterbalanced by the potential for abuse or technological obstacles for some citizens to access the meeting. Thus, any public body

[3] The Civil Rights Division of the Department of Justice offers a helpful guide to state and local government entities seeking to create a website that complies with the Americans with Disabilities Act. The document can be found at www.ada.gov/websites2.htm.

choosing to use technological means to conduct its meetings must scrupulously comply with the notice and minute-keeping requirements imposed by the Open Meeting Law and must further make all reasonable efforts to facilitate public access to the meeting, whether through explicit instructions on using the technology or by providing access to the meeting at the public body's own facilities.

Terry Goddard
Attorney General

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL September 29, 2008	No. I08-008 (R08-036) Re: Application of Open Meeting Law to Meetings of Public Bodies Conducted Online

To: A. Dean Pickett, Esq.
Mangum, Wall, Stoops & Warden, P.L.L.C.

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), you submitted for review your opinion to the Superintendent of the Camp Verde Unified School District Governing Board (the "Board") regarding the Board's ability to conduct a meeting through the Internet during which the Board would engage in deliberations and discussion. This Office concurs with your conclusion that, after providing proper notice and an agenda in accordance with the Open Meeting Law and implementing procedures designed to safeguard the public's access to the meeting, a public body can conduct an online meeting to allow deliberation and discussion about matters within the public body's jurisdiction. We issue this Opinion to provide guidance concerning this matter to all public bodies subject to the Open Meeting Law. *See* Ariz. Att'y Gen. Op. I06-003.

Question Presented

Does the Open Meeting Law, A.R.S. §§ 38-431 to 38-431.09, allow the governing board of a school district to conduct deliberations and discussion in an online meeting when the Board provides proper notice under the law and facilitates public access to the online meeting through the Internet?

Summary Answer

Yes. The definition of "meeting" under A.R.S. § 38-431 includes the gathering of a quorum of a public body through technological devices and would encompass serial communications of a quorum of the public body through the Internet or other online medium. Measures must be taken, however, to provide clear notice to the public about when the Board will be deliberating in its online meeting and to facilitate the public's access to the meeting.

Analysis

You have asked this Office to evaluate your opinion regarding a proposal by the Board to conduct online meetings to discuss and edit documents. The Board does not propose to take any legal action during the online meeting. The Board meeting would be conducted online for a defined time period with members accessing the document over the Internet to comment and propose changes. Board members would not necessarily be editing or commenting on the document simultaneously. The public could also access the document over the Internet, but could only review changes and comments made by the Board members.[1] The public would be able to see which Board member proposed each change or submitted a comment. The Board proposes to offer free computer access at or near its offices during the online meeting. After

[1] Under the Open Meeting Law, the Board is not required to offer editing or commenting rights to the public. The public has the right to attend and observe the Board's proceedings, but no right to participate in the proceedings unless the Board allows it. A.R.S. § 38-431.01.

the online meeting for comment and revision ends, the Board would conduct a traditional meeting at its office to take legal action to adopt the final version of the document. At this meeting, the Board would include a call to the public so that members of the public could address comments about the document to the Board. Under these circumstances, is a "virtual meeting" in which Board members participate through serial communications over the Internet in compliance with the requirements of the Open Meeting Law?

Construed in a fashion most favorable to open and public meetings, as directed by the Legislature in A.R.S. § 38-431.09, the Open Meeting Law allows the Board to hold a virtual meeting through technological devices if it otherwise complies with the requirements of the statute. Under the Open Meeting Law, "all meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings." A.R.S. § 38-431.01. A "meeting" consists of "the gathering, in person *or through technological devices*, of a quorum of members of a public body at which they discuss, propose, or take legal action, including any deliberations by a quorum with respect to such action." A.R.S. § 38-431(4) (emphasis added). The Open Meeting Law clearly contemplates the ability of the Board to hold meetings through the use of technological devices, such as telephones, video-cameras, or even web-cameras, in which all members of the body are present simultaneously to discuss the Board's business.

Additionally, the statute allows the Board to meet through serial communications to discuss and deliberate about Board business if accomplished in compliance with the terms of the Open Meeting Law. This Office previously opined that serial e-mail communications without notice or public access between a quorum of a public body's members about public business constituted a meeting through technological devices that violated the Open Meeting

Law. Ariz. Att'y Gen. Op. I05-004. In that opinion, the Attorney General noted that "even if communications on a particular subject between members of a public body do not take place at the same time or place, the communications can nonetheless constitute a 'meeting.'" *Id.* at 4. Thus, the Board can conduct a virtual meeting in which a quorum of Board members contribute comments and edits to a document posted on the Internet through serial communications if the Board complies with the notice requirements, minute-keeping requirements, and other provisions of the Open Meeting Law.[2] To comply with the statute, the public must be able to access the entire course of discussion or deliberation between the Board members and be able to identify which Board members contributed which edits or comments. In addition, the Board must ensure that it creates a document retention policy under the public records statute to govern the maintenance and preservation of electronic documents created in this process.

Although using technology may provide broader access to the public than would otherwise be possible, virtual meetings such as those proposed by the Board also provide potential obstacles for public access based on uncertainty about the timing of the meeting, lack of equipment necessary to access the meeting, or unfamiliarity with operating such equipment. To offset these risks, this Office encourages the Board to strictly comply with the notice and minute-keeping requirements of the Open Meeting Law and to facilitate the public's access to

---

[2] We note that under A.R.S. § 38-431.01(A), any member of the public who so desires must be permitted to "attend *and listen* to the deliberations and proceedings" in an open meeting. (Emphasis added.) It is unlikely that this provision restricts the requirements of the Open Meeting Law to only allow meetings in which every person can hear the proceedings. In the case of an agency like the Arizona Commission for the Deaf and Hard of Hearing, some members of the public 'listen" to proceeding by observing sign language interpreters. It would be inconsistent with the purpose of the Open Meeting Law to find a violation of the statute because not every member of the public can listen to an audible meeting. *See* A.R.S. § 38-431.09. We conclude that the mandate to interpret the Open Meeting Law in favor of open and public meetings requires an interpretation of "listen" that includes other methods of observing deliberations and proceedings of a board, including non-audible methods.

the virtual meeting. Because not all citizens own a computer or have Internet access, the Board should take measures at its facility to allow public access to the on-line meeting. Your suggestions that the Board provide free Internet access at or near the Board office and maintain regular print-outs of the results of the on-line meeting for public review provide valid solutions to address these concerns. Regarding the notice for the on-line meeting, the Board should provide clear notice of when the meeting will begin and end, as well as clear instructions on how to access the meeting or to operate any software used by the Board to host the on-line meeting. The notice should also indicate to the public how the Board intends to facilitate public access, including the location of any free Internet access offered by the Board or printouts of the results of the on-line meeting. In addition, the notice should also include the proposed date and time of the meeting at which the Board intends to take final action adopting the proposed document. The Board must also offer reasonable accommodations to any member of the public with a disability that requests accommodation, as required by federal law.[3]

Conclusion

The Board can lawfully hold a virtual meeting, including one comprised of serial communications through the Internet, under the Open Meeting Law. Continuing developments in telecommunications technology offer the promise of widening the public's access to meetings held by public bodies, whether by web-casting meetings or allowing other forms of virtual meetings. This promise, however, is counterbalanced by the potential for abuse or technological obstacles for some citizens to access the meeting. Thus, any public body

[3] The Civil Rights Division of the Department of Justice offers a helpful guide to state and local government entities seeking to create a website that complies with the Americans with Disabilities Act. The document can be found at www.ada.gov/websites2.htm.

choosing to use technological means to conduct its meetings must scrupulously comply with the notice and minute-keeping requirements imposed by the Open Meeting Law and must further make all reasonable efforts to facilitate public access to the meeting, whether through explicit instructions on using the technology or by providing access to the meeting at the public body's own facilities.

Terry Goddard
Attorney General